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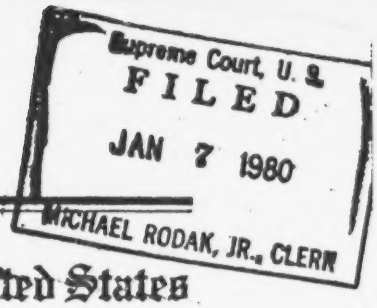

In the Supreme Court of the United States

OCTOBER TERM, 1979

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ASSOCIATED DRY GOODS CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ASSOCIATED DRY GOODS CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Equal Employment Opportunity Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-13a) is not yet officially reported. The opinion of the district court (App. D, *infra*, 16a-32a) is reported at 454 F. Supp. 388.

JURISDICTION

The judgments of the court of appeals (Apps. B and C, *infra*, 14a-15a) were entered on October 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Sections 706(b) and 709(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5 (b), and 2000e-8(e), prohibit the Equal Employment Opportunity Commission, prior to the institution of a suit, from disclosing information obtained during its investigation of a charge to the parties immediately involved in the charge.

STATUTES AND REGULATIONS INVOLVED

Section 706(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(b), provides in pertinent part:

> Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. * * * If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or

> used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. * * *

Section 709(e) of Title VII, 42 U.S.C. 2000e-8(e), provides:

> It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

Section 1601.22 of the Equal Employment Opportunity Commission regulations, 29 C.F.R. 1601.22, provides:

> Neither a charge, nor information obtained pursuant to section 709(a) of Title VII, nor information obtained from records required to be kept or reports required to be filed pursuant to section 709(c) and (d) of Title VII, shall be made matters of public information by the Commission prior to the institution of any proceedings under this Title involving such charge or information. This provision does not apply to such earlier disclosures to charging parties, or

> their attorneys, respondents or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief. This provision also does not apply to such earlier disclosures to representatives of interested Federal, State, and local authorities as may be appropriate or necessary to the carrying out of the Commission's function under Title VII, nor to the publication of data derived from such information in a form which does not reveal the identity of charging parties, respondents, or persons supplying the information.

Section 1610.17(d) of the Commission's regulations, 29 C.F.R. 1610.17(d), provides:

> Special disclosure rules apply to the case files for charging parties, aggrieved persons on whose behalf a charge has been filed, and entities against whom charges have been filed. The special disclosure rules are available in the public reading areas of the Commission. Under sections 706 and 709, case files involved in the administrative process of the Commission are not available to the public.

Disclosure provisions of the EEOC Compliance Manual are set forth in Appendix E, *infra*, 33a-46a.

STATEMENT

1. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255, prohibits employment discrimination based on an individual's race, color, religion, sex or national origin. 42 U.S.C. 2000e-2. The Act created the Equal Employment Opportunity

Commission and empowered it to prevent unlawful employment practices. 42 U.S.C. 2000e-4 and 2000e-5. An aggrieved person may file with the Commission a charge of employment discrimination, which the Commission must investigate and which, under Section 706(b), may not be "made public." 42 U.S.C. 2000e-5(b). If after such investigation the Commission determines that there is reasonable cause to believe the charge is true, it must endeavor to eliminate the unlawful practice through "informal methods of conference, conciliation, and persuasion." *Ibid.* "Nothing said or done during and as a part of such informal endeavors," however, "may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." *Ibid.*

In connection with its investigation of a charge, the Commission is entitled under Section 709(a) to inspect and copy any evidence of any person being investigated or proceeded against that relates to the alleged employment practice. 42 U.S.C. 2000e-8(a). Employers must maintain records prescribed by the Commission relevant to the determinations of whether unlawful employment practices have been or are being committed. 42 U.S.C. 2000e-8(c). Section 709(e) prohibits "the Commission [from making] public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any [civil action] involving such information." 42 U.S.C. 2000e-8(e).

The Commission's regulations provide that charges and investigative information shall not be made matters of public information by the Commission prior to any civil enforcement action involving such charge or information. 29 C.F.R. 1601.22. "This provision," however, "does not apply to such earlier disclosures to charging parties, or their attorneys, respondents or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief." *Ibid.* In addition, after dismissal of a charge or after the expiration of the 180-day period for investigation and conciliation of charges, the Commission permits access to the investigative file by complainants and their attorneys in connection with pending or "contemplated litigation" (App. E, *infra*, § 83.3(a)).[1] Persons to whom disclosure is made must sign an EEOC form agreement not to disclose the information obtained from the Commission (*id.* at § 83.4). This petition presents the question of the validity of these disclosure provisions.

2. From 1971 through 1973 several charges of employment discrimination by individual employees and former employees of Joseph Horne Company ("Horne's"), a division of Associated Dry Goods Corporation, were filed with the Commission (App. D, *infra*, 17a). Pursuant to Section 709, the Commission requested Horne's to disclose employment information relating to the charges (*ibid.*). Horne's

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[1] Access may also be permitted prior to the expiration of the 180 days upon a showing of "compelling need for access." *Ibid.*

refused to furnish the materials unless the Commission provided written assurance that the information contained in the records would not be disclosed to the charging parties, their counsel, or persons interviewed during the Commission's investigation (*ibid.*). The Commission refused, explaining that, although it does not disclose all information received from an employer, some disclosure to the charging party is necessary to analyze or clarify data and that parties who contemplate filing suit and their counsel are allowed limited access to the Commission's investigative files. Such persons must agree not to make the information public (*ibid.*). 29 C.F.R. 1601.22.[2]

The Commission subsequently issued a subpoena *duces tecum* to obtain the requested information (App. D, *infra*, 18a). Without complying, Associated filed this action for declaratory and injunctive relief in the United States District Court for the Eastern District of Virginia, challenging the validity of the Commission's regulations and procedures allowing disclosure of information to charging parties and their attorneys prior to suit, including disclosure made during the course of investigating and conciliating a charge (*ibid.*). The suit was subsequently consolidated with an action filed by the Commission

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[2] In October 1977, the regulation, which since 1966 had authorized disclosure to the immediate parties, witnesses and interested governmental authorities, was amended to include disclosure to the parties' attorneys, as had been the Commission's prior informal practice. 42 Fed. Reg. 55392 (1977).

in the United States District Court for the Western District of Pennsylvania to enforce its subpoena. Associated contended in both suits that the Commission's limited disclosure rules violated the prohibitions in Sections 706(b) and 709(e) against making information obtained by the Commission "public" prior to the institution of a suit.

The district court enforced the subpoena but held that the Commission's disclosure procedures are invalid (App. D, *infra*, 16a-32a). It concluded that limited disclosure to charging parties and their attorneys is a prohibited disclosure to the "public" (*id.* at 22a-25a). The court of appeals affirmed over the dissent of Judge Hall (App. A, *infra*, 1a-13a). The majority adopted the reasoning of *Sears, Roebuck & Co.* v. *Equal Employment Opportunity Commission*, 581 F.2d 941 (D.C. Cir. 1978), and *Burlington Northern, Inc.* v. *Equal Employment Opportunity Commission*, 582 F.2d 1097 (7th Cir. 1978), cert. denied, 440 U.S. 930 (1979), both of which held that the prohibitions on public disclosure prohibit the Commission from releasing to individual charging parties investigative materials obtained in nationwide investigations of multiple charges (including commissioner's charges) against the same employers. The court of appeals refused to follow the decision in *H. Kessler & Co.* v. *Equal Employment Opportunity Commission*, 472 F. 2d 1147 (5th Cir.) (*en banc*), cert. denied, 412 U.S. 939 (1973), which held that disclosure to charging parties of information relating to their own individual charges is not disclosure to the public within

the meaning of Sections 706(b) and 709(e). Rejecting the EEOC's contention that its investigation and conciliation functions would be frustrated if it could not disclose information to the persons directly involved in a charge, the court stated that necessary corroboration of information may "easily be obtained" by interrogating employees and witnesses on the basis that " 'it has been said' or 'it has been reported' without providing them with letter and verse of the employer's contentions * * *" (App. A, *infra*, 6a).

Judge Hall dissented on the ground that the limited disclosure authorized by the Commission to immediate parties involved best served the purposes of the Act. "Once a private action has been brought under Title VII," he observed, "the statute imposes no restrictions on the public dissemination of relevant material in the EEOC files, except for conciliation information" (App. A, *infra*, 10a). He agreed with the Commission that disclosure before suit "discourage[s] meritless litigation, by informing potential litigants of the weakness of their cases * * *" (*id.* at 10a-11a).

REASONS FOR GRANTING THE PETITION

1. There is an irreconcilable conflict among the circuits. In *H. Kessler & Co.* v. *Equal Employment Opportunity Commission*, 472 F.2d 1147, cert. denied, 412 U.S. 939 (1973), the Fifth Circuit, sitting en banc, held that the word "public," in each of the three places it appears in Sections 706(b) and 709(e),

refers to disclosures to the public at large and does not refer to disclosures to the immediate parties or their counsel. As here, *Kessler* arose after an employer refused to comply with an investigative demand. The Commission brought suit to enforce the demand, and the employer sued to quash it, among other reasons, because the Commission's policy was to allow investigative material to be turned over to the charging party's counsel. See 53 F.R.D. 330, 340 (N.D. Ga. 1971). On appeal, the Fifth Circuit's *en banc* decision rejected the employer's argument and approved the Commission's practice of disclosing materials to "the charging party, the respondent, witnesses, and representatives of interested Federal, State and local agencies as may be appropriate or necessary to the carrying out of the Commission's functions * * *" and to "counsel for the charging party after expiration of the statutory period for investigation and conciliation (60 days [now 180 days] from the date of filing with the Commission) to determine whether or not, in counsel's opinion, the facts justify the commencement of a civil action * * *." 472 F.2d at 1149. These are the same practices, reviewed in the same procedural posture, that were held invalid by the decision below.[3]

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[3] *Kessler* is also at odds with *Sears, Roebuck and Co.* v. *Equal Employment Opportunity Commission*, 581 F.2d 941 (D.C. Cir. 1978), and *Burlington Northern, Inc.* v. *Equal Employment Opportunity Commission*, 582 F.2d 1097 (7th Cir. 1978), cert. denied, 440 U.S. 930 (1979), although those decisions arose in a different factual context. In *Sears* and *Burlington Northern* the investigative files at issue were the

2. The decision below is incorrect. The Commission has a statutory responsibility to attempt to negotiate settlements between employers and employees. 42 U.S.C. 2000e-5(b). To this end, the Commission necessarily must disclose investigative materials. Senator Humphrey, when introducing the nondisclosure provision that was eventually enacted, explained that the ban on public disclosure was "a ban on publicizing" and did not prohibit "such disclosure as is necessary to the carrying out of the Commission's duties under the statute." 110 Cong. Rec. 12723 (1964). He added (*ibid.*):

> Obviously, the proper conduct of an investigation would ordinarily require that the witnesses be informed that a charge had been filed and often that certain evidence had been received. Such disclosure would be proper. The amendment is not intended to hamper Commission investigations or proper cooperation with other State and Federal agencies, but rather is aimed at the making available to the general public of unproven charges.

As the *Kessler* court pointed out (472 F.2d 1151), although the term "make public" is not defined in the Act, it is used in a manner that supports the Commis-

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Commission's "nationwide files" on the employers which contained information concerning more than the circumstances of the charging party's employment. Both cases, moreover, involved the additional issue of whether Section 709(e) prohibits disclosure to the named plaintiffs in actual or threatened class actions comprehending employees allegedly discriminated against.

sion's interpretation of the term. Section 706(b), 42 U.S.C. 2000e-5(b), states that the Commission shall furnish the employer with "a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice)," but such "[c]harges shall not be made public." The same section further provides that the Commission shall undertake to conciliate charges but that nothing said or done as a part of the conciliation proceedings "may be made public by the Commission * * * without the written consent of the persons concerned." Since the employer is thus to be informed about the charge, and since the employer and the aggrieved person must be parties to any conciliation, both the charge and matters arising in the course of conciliation proceedings will necessarily be known or made known to both the charging party and the employer. Accordingly, the the term "public" in Section 706(b) plainly contemplates persons other than the charging party and the employer. There is no suggestion that the term was meant to carry a different meaning when used in Section 709(e). Accordingly, the term "make public" throughout Title VII should not be read to prohibit disclosures to the employer, the charging party, and their counsel.[4]

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[4] In support of its decision, the court below incorporated by reference the reasoning of the Seventh and D.C. Circuits in *Sears* and *Burlington Northern*. Those opinions are unpersuasive. First, *Burlington Northern* suggested that disclosure of materials in the investigative file would stir up litigation. 582 F.2d at 1100. At least as applied to individual charging parties, however, it is a failure to disclose that could well

3. The issue is of substantial importance. The court below made clear, as the courts in *Sears* and *Burlington* did not, that under its interpretation of Sections 706(b) and 709(e) the Commission is even

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have that effect. If individual charging parties could not obtain materials in the Commission's files until after they have brought suit, they might well be encouraged to use litigation as an investigative tool and to postpone serious settlement negotiations until after suit has been filed and the Commission's investigative materials have been obtained. Second, contrary to the suggestion of the court of appeals in *Burlington Northern*, the 1972 amendments to the Civil Rights Act did not in any way undermine the rationale of the *Kessler* decision. The language of Section 709(e) was not changed, and there is no reason to suppose that Congress intended to alter the scope of its ban on publicizing investigative materials. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 354 n.39 (1977). With respect to conciliation, Congress changed the language of former Section 706(a), 42 U.S.C. (1970 ed.) 2000e-5(a), which permitted disclosure upon the "consent of the parties," to the present language of Section 706(b), which requires the "consent of the persons concerned." There is no explanation in the legislative history for this change and no suggestion that a modification in substance was intended. The court's suggestion that Congress in 1972 intended private employment discrimination actions to play a less prominent role in civil rights enforcement is erroneous. Congress in 1972 was careful to preserve the private right of action. See *Occidental Life Insurance Co.* v. *Equal Employment Opportunity Commission*, 432 U.S. 355, 361-366 (1977). This Court noted in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974), that even after the 1972 amendments gave enforcement authority to the Commission, "the private right of action remains an essential means of obtaining judicial enforcement of Title VII." For a critique of the various arguments adopted in *Sears* and *Burlington Northern*, see Comment, *The Meaning of "Public" in Section 709(e) of the 1964 Civil Rights Act and Access to Information Gathered by the EEOC,"* 67 Ky. L. J. 430 (1978-1979).

prohibited from revealing any information about a charge to the immediate parties during the investigation and conciliation of the charge.[5] This ruling will impose a severe restraint on the Commission's process of conciliation. In 1977, the Commission adopted a conciliation procedure under which, after obtaining a statement from charging parties and requesting answers to interrogatories from the employers, it invites charging parties and employers to a fact-finding conference. This procedure has resulted in the settlement of far greater numbers of charges than had previously occurred, but, under the decision of the court of appeals, its effectiveness would be greatly impaired because disclosures by the Commission to the parties during these conferences would be unlawful, in the absence of consent.[6]

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[5] The court's view that information may not be disclosed to facilitate the investigation or conciliation of a charge is manifest in its conclusion that the prohibitions on disclosure will not unduly restrict Commission investigations because corroborative information can be obtained by indirect methods, without direct disclosure of investigative materials (App. A, *infra*, 6a).

[6] The new fact-finding procedure was first instituted in the EEOC district offices in Baltimore, Dallas and Chicago. In one year's time the proportion of negotiated settlements out of all charges filed rose in these regions from 14% to 48%. See EEOC, Report on Results in Model Offices Testing New Charge Processing Systems 1 (Sept. 1977-1978). Already some employers in the Fourth Circuit have refused to attend fact-finding conferences on the ground that this would result in disclosure of investigative material.

We assume that investigative materials could be disclosed with consent, although Section 709(e) does not specifically so

Moreover, the work of an investigator is obviously frustrated if facts given by one party cannot be presented to the other for verification or denial. On the basis of its experience, the Commission believes that, unless it has the ability to name names or show documentary evidence, rather than having to rely entirely on the sort of circumlocutions suggested by the opinion below (see App. A, *infra*, 6a),[7] the parties often will not accept statements made to them by EEOC investigators, for purposes of either investigation or settlement. Conciliation would be especially hampered because the Commission would be prohibited from disclosing information to enable the parties to appreciate the merits of the charge, to assess the strengths and weaknesses of their respective positions, and to evaluate the terms of a settlement proposal. Moreover, under the court of appeals' decision, the Commission would be unable to disclose, as it normally does in its reasonable-cause decisions, the facts underlying its finding that there is probable cause to believe the charge is true.

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provide. It cannot be assumed, however, that both parties to a charge will consent to full unconditional disclosure at the discretion of the Commission.

[7] If the "public" in fact includes the immediate parties, we question whether the indirect methods of obtaining corroborative evidence suggested by the court—inquiring by stating that "it has been said"—are permitted under the court's construction of Section 709(e). That section states that the Commission may not "make public *in any manner whatever* any information obtained * * *." 42 U.S.C. 2000e-8(e) (emphasis supplied).

It is essential to the effective functioning of the Commission that the conflict in decisions concerning information the Commission can and cannot reveal be resolved. As a result of the conflicting decisions, the Commission has different disclosure rules in effect in different circuits regarding both the disclosure of information during its conciliation and investigative proceedings and the disclosure of materials in its investigative files to charging parties for the purpose of bringing suit. Particularly in view of the fact that Sections 706(b) and 709(e) impose criminal penalties on Commission employees for prohibited disclosure, the uncertainty and confusion resulting from the conflicting decisions should be resolved.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1980

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 78-1695

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLEE

v.

JOSEPH HORNE COMPANY, A Division of Associated Dry Goods Corporation, APPELLANT

No. 78-1696

ASSOCIATED DRY GOODS CORPORATION, APPELLEE

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond, Robert R. Merhige, Jr., District Judge

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Argued April 4, 1979 Decided October 10, 1979

Before HAYNSWORTH, Chief Judge, and WINTER and HALL, Circuit Judges.

WINTER, Circuit Judge:

In these consolidated cases, the Equal Employment Opportunity Commission (EEOC) sought to enforce its administrative subpoena *duces tecum* to obtain information about the employment practices of Joseph Horne Company (Horne), a wholly owned subsidiary of Associated Dry Goods Company (Associated) with regard to race and sex, and Associated sought to challenge the validity of certain practices of EEOC relating to disclosure of EEOC investigative files to charging parties both by a suit for declaratory and injunctive relief and by resistance to the subpoena. The district court held that the EEOC procedural regulations set forth in 29 C.F.R. §§ 1601.20 and 1601.17(d) and the special disclosure rules contained in § 83 of the EEOC Compliance Manual were void, invalid and unenforceable to the extent that they authorize EEOC to disclose to charging parties any information in EEOC investigative files. It therefore enjoined such disclosures and it granted enforcement of the subpoena subject to this restriction on the use of the data to be obtained. Finally, Associated's request for attorneys' fees was denied.

Both parties appeal, and we affirm.

I.

From November 1971 through June 1973, several employees and former employees of Horne filed race

and sex discrimination charges with EEOC. The latter undertook to investigate the charges and it served interrogatories on Horne, seeking relevant information. Horne, however, refused to answer the interrogatories without assurances from EEOC that the answers would not be disclosed to the charging parties, their attorneys, or others. EEOC's view of its authority and its policy is directly to the contrary, *see* 29 C.F.R. §§ 1601.20 (current version at 29 C.F.R. § 1601.22) and 1601.17(d); § 83 of EEOC Compliance Manual, and it declined to give the requested assurances. EEOC therefore issued a subpoena *duces tecum* to obtain the information. Horne petitioned EEOC to revoke the subpoena. At the time, EEOC had three commission members, two of whom affirmatively approved the decision not to revoke it. When Horne's petition was denied, Horne did not comply with the subpoena; but Associated filed an action challenging the Commission's disclosure policies and seeking declaratory and injunctive relief. EEOC in turn instituted suit to enforce compliance with its subpoena and the cases were consolidated and decided together.

II.

The first issue that we must address is Associated's argument that the subpoena was invalidly issued because EEOC lacked a quorum when it denied Horne's petition to revoke the subpoena. Its argument is premised upon the fact that the Commission has a statutory size of five members, 42 U.S.C. § 2000e-4 (a), with a direction that three shall constitute a

quorum, 42 U.S.C. § 2000e-4(c), and the record shows that only two commissioners voted in writing to deny the petition to revoke the subpoena, notwithstanding that 29 C.F.R. § 1601.15(b) (1975) in effect at the time provided that a petition to revoke a subpoena shall be reviewed by the Commission. The district court was of the view that since the two votes approving denial of the petition would likely have prevailed in any event, any absence of the third member was immaterial and only a *de minimis* deviation from EEOC's then regulation.

We are in essential agreement with the district court. We have heretofore approved the validity of the regulation which permits the Compliance Director's determination of whether to permit a subpoena to issue to prevail unless the Commission decides otherwise. EEOC v. South Carolina National Bank, 562 F.2d 329, 333 (4 Cir. 1977). Under the regulation, the members of the Commission need take affirmative action only if they conclude to reverse the Compliance Director's determination. Here the record shows that a majority of the then Commission voted to sustain issuance of the subpoena so that the subpoena would have issued regardless of the vote of the third member. Since we view a vote on the correctness of the Compliance Director's determination not a consultive act requiring an exchange of views, we think it makes no difference to the validity of the subpoena that the record does not show a vote by the third member.

III.

The Commision appeals from the determination that the disclosure to charging parties and their attorneys of investigative materials prior to suit is in violation of 42 U.S.C. § 2000e-5(b) and 2000e-8(e), and therefore 29 C.F.R. §§ 1601.20 (current version at 29 C.F.R. § 1601.22) and 1601.17(d) and the special disclosure rules of § 83 of EEOC Compliance Manual are void to the extent that they provide otherwise.

The restrictions upon disclosure by EEOC of investigative information contained in §§ 2000e-5(b) and 2000e-8(e) and their effect upon the validity of EEOC's regulations and Compliance Manual have been thoroughly considered by three Courts of Appeals with conflicting conclusions. The Fifth Circuit in H. Kessler & Co. v. EEOC, 472 F.2d 1147 (5 Cir. 1973) (in banc), a case on which EEOC heavily relies, held that charging parties and their attorneys are not members of the "public" within the meaning of the restrictive statutory language and consequently the regulations and the Compliance Manual do not exceed the statute and thus are valid and enforceable. The District of Columbia Circuit in Sears, Roebuck & Co. v. EEOC, 581 F.2d 941 (D.C. Cir. 1978), a case on which the district court in the instant case relied, and the Seventh Circuit in Burlington Northern, Inc. v. EEOC, 582 F.2d 1097 (7 Cir. 1978), *cert. denied*, —— U.S. —— (February 21, 1979), reached the opposite conclusion. While *Sears* and *Burlington*

attempted to distinguish *Kessler* (unpersuasively, we think), they also declined to follow it if it were indistinguishable.

The analysis of the legal arguments, the legislative history and the policy considerations on both sides of the question are so fully developed in *Kessler*, *Sears* and *Burlington* that we see little purpose in repeating them here, except to comment on two arguments of EEOC which are made to us. First, EEOC contends that a decision prohibiting EEOC from disclosure will unduly restrict it in conducting an investigation as, for example, when EEOC seeks corroboration from the individuals concerned of information supplied by their employer that their qualifications for the position to which they were promoted or for which they were hired were superior to those of the charging party who was not promoted or hired. We think that such corroboration may easily be obtained without violating the statutory restrictions by interrogating those employees on the basis that "it has been said" or "it has been reported" without providing them with letter and verse of the employer's contentions or the specific identity of the representative of the employer advancing the contention. Second, we do not view our decision in Charlotte-Mecklenburg Hospital Authority v. Perry, 571 F.2d 195 (4 Cir. 1978), as supporting EEOC's position in the instant case. That case arose under the Freedom of Information Act and the parties did not dispute the then judicial and administrative construction of Title VII permitting disclosure of investigative files to the

party charged and the charging party. The instant case presents the dispute and we resolve it by following the District of Columbia and the Seventh Circuits.

We therefore hold that §§ 2000e-5(b) and 2000e-8(e) prohibit EEOC from disclosing investigative materials to the parties prior to suit. The provisions of the regulations and the Compliance Manual purporting to authorize such disclosures are invalid and unenforceable.

IV.

For the reasons assigned by the district court, we see no merit in Associated's contentions that enforcement of the subpoena should be forbidden because of EEOC's delay or misconduct in causing it to be issued, or because a charging party (Alice M. Corvino) filed suit to redress the discrimination allegedly practiced by Horne against her. Manifestly, in the view that we take of the case, the district court was correct in denying Associated counsel fees.

AFFIRMED.

HALL, Circuit Judge, concurring in part and dissenting in part:

I concur in that portion of the majority opinion which grants enforcement of the EEOC subpoena and denies the attorney fees requested by Horne, but dissent from the majority's invalidation of the EEOC disclosure rules.

The EEOC rules at issue allow an individual who files an employment discrimination charge with the agency, and who is considering pursuing his complaint through private litigation, to inspect portions of the material the agency has gathered in the course of investigating his charge. The majority now holds that this disclosure violates the command of 42 U.S.C. §§ 2000e-5(b) and 2000e-8(e) that the agency shall not "make public" the results of its investigations until litigation involving the information has begun. The majority adopts the analyses of *Sears, Roebuck & Co.* v. *EEOC*, 581 F.2d 941 (D.C. Cir. 1978) and *Burlington Northern, Inc.* v. *EEOC*, 582 F.2d 1097 (7th Cir. 1978), cert. denied 99 S.Ct. 1267 (1979), decisions based not so much on the language of the statute [1] as on the courts' belief that disclosure would

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[1] Neither the language of the statute nor its history addresses the issue of whether the charging party is a member of the "public" to whom disclosure is forbidden. The Fifth Circuit, sitting *en banc* and construing essentially the same statutory language, concluded that the term "public" does not include the charging party. *H. Kessler & Co.* v. *EEOC*, 472 F.2d 1147 (5th Cir. 1973) (en banc), cert. denied 412 U.S. 939. See also *Charlotte-Mecklenburg Hospital Authority* v. *Perry*, 571 F.2d 195 (4th Cir. 1978), in which this court ordered the disclosure of EEOC investigatory material to a party charged with discrimination, apparently accepting the plaintiff's uncontested argument that the language of Title VII "suggests a manifest distinction between, on the one hand, right of disclosure to the public generally, and, on the other hand, a right of disclosure to the parties themselves . . . [D]isclosure to the parties—whether to the party charged or to the charging party—is not within the prohibitions of Title VII." 571 F.2d at 199.

encourage private litigation and "necessarily undercut the preferred enforcement scheme of comprehensive negotiation and settlement." *Burlington Northern*, 582 F.2d at 1100. I believe that these decisions are predicated upon a fundamental misconception of both the importance of private litigation in Title VII enforcement and the impact of the disclosure rules on the conciliation process.

The Commission's disclosure rules, to the extent that they allow a charging party access to his own case file,[2] are narrow in scope. Disclosure of the file contents is permitted only "in connection with pending or contemplated litigation." EEOC Compliance Manual § 83.3(a). No disclosure is made prior to the beginning of the 90-day period during which a private action may be brought, absent a showing of "compelling need." *Compare* 42 U.S.C. § 2000e-5(f)(1) *with* EEOC Compliance Manual § 83.3(a). Certain types of information are expunged from the case file before it is disclosed, including the identities and statements of witnesses who have been promised confidentiality by the Commission, and all information concerning the Commission's attempts to settle the

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[2] The rules also permit the charging party to inspect files containing other charges against the same respondent which allege similar types of discrimination. EEOC Compliance Manual § 83.7(c). I believe that this constitutes "publicizing" the other files, and that this disclosure, prior to litigation involving the information, is forbidden by the statute. I would invalidate the disclosure rules only insofar as they allow a party access to other case files.

charge through conciliation.[3] *Id.* § 83.6. Once a private action has been brought under Title VII, the statute imposes no restrictions on the public dissemination of relevant material in the EEOC files, except for conciliation information. Therefore, in most cases the practical effect of the disclosure rules is to allow access to investigatory material 90 days, at most, before it would otherwise be disclosed.

I do not believe that such a limited disclosure of information would have the dire effects predicted by the *Sears* and *Burlington Northern* courts.[4] The Commission contends that the disclosure rules discourage

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[3] The employer in this case contends that confidential business data is included in the materials disclosed by the Commission, although it offers no substantiation for this claim. Regardless of whether the Commission's disclosure rules specifically exempt legitimate trade secrets and other confidential business information, disclosure of such material is forbidden by 18 U.S.C. § 1905, and the Administrative Procedures Act provides an adequate remedy for threatened violations of this statute. *See Chrysler Corp.* v. *Brown,* 99 S.Ct. 1705 (1979).

[4] In addition to fear that the disclosure rules undercut the Commission's settlement efforts, the *Sears* court expressed concern that the Commission could not enforce the agreements it requires as a condition of disclosure, which prohibit the charging party from public dissemination of the information. EEOC Compliance Manual § 83.3(b). "[C]ounsel for the Commission asserted that the EEOC . . . could seek to enjoin parties from violating their agreement . . . . When pressed, however, counsel could point to no instance when this had been done." 581 F.2d at 946. This may be explained by the Commission's uncontested assertion in this court that there has never been a violation of the agreement in the 13 years during which the rules have been in effect.

meritless litigation, by informing potential litigants of the weakness of their cases, and that meritorious suits which may be encouraged by the rules complement, rather than hinder, its own enforcement efforts. I find this assessment by the agency responsible for enforcing Title VII, based on thirteen years of experience with the disclosure rules in practice, more persuasive than speculation engaged in by the courts. *Cf. Cannon* v. *University of Chicago*, 99 S.Ct. 1946, 1962-1963 (1979).

The *Sears* and *Burlington Northern* decisions, which the majority now adopts, are premised upon a concept of private litigation as the ugly stepchild in the Title VII scheme, to be discouraged whenever possible.[5] But private litigation has been an integral

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[5] This theory is criticized, based upon a thorough review of the legislative history of Title VII, in *The Meaning of "Public" in Section 709(e) of the 1964 Civil Rights Act and Access to Information Gathered by the EEOC*, 67 Ky. L.J. 430 (1978-79).

The congressional explanation of the need for the 1972 Amendments casts doubt upon the *Sears* and *Burlington Northern* courts' faith in voluntary conciliation as the preferred means of ending discrimination:

> During the preparation and presentation of Title VII of the Civil Rights Act of 1964 . . . [i]t was thought that a scheme which stressed conciliation rather than compulsory processes would be more appropriate for the resolution of this essentially "human" problem. Litigation, it was thought, would be necessary only on an occasional basis in the event of determined recalcitrance. Experience, however, has shown this to be an oversimplified expectation, incorrect in its conclusions . . . [T]he Commission has been able to achieve successful conciliation

part of the Title VII enforcement scheme since the statute's enactment in 1964. The 1972 Amendments strengthened the Commission's own enforcement powers, but also encouraged private actions through provisions for appointment of counsel and commencement of actions without payment of fees, costs or security. In retaining private litigation as a critical enforcement tool, Congress emphasized that "[t]he primary concern must be protection of the aggrieved person's option to seek a prompt remedy in the best manner available." H.R. Rep. No. 238, 92nd Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2148.

Congress also recognized that "the nature of Title VII actions more often than not pits parties of unequal strength and resources against each other. The complainant, who is usually a member of a disadvantaged class, is opposed by an employer who not infrequently is one of the nation's major producers, and who has at his disposal a vast array of resources and legal talent." *Id.* at 2148. This disparity is increased by the fact that "the entire area of employment discrimination is one whose resolution requires not only expert assistance, but also the technical perception that a problem exists in the first place, and

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in less than half of the cases in which reasonable cause was determined. It has been the emphasis of voluntariness that has proven to be most detrimental to the successful operation of Title VII. H.R. Rep. No. 238, 92nd Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2143-2144.

that the system complained of is unlawful." *Id.* at 2144. The disclosure rules, in recognition of this difficulty, provide the aggrieved individual with the benefit of the Commission's "technical perception" at the most appropriate time—when he must decide whether to bring a private action. The majority's invalidation of the rules will force the individual to file an action, and then learn through discovery whether he has a meritorious case. I fail to see how this will promote any of the statute's objectives.

In upholding the right of an individual to bring an action alleging employment discrimination under 42 U.S.C. § 1981, by-passing the administrative remedies entirely, the Supreme Court stated: "Conciliation and persuasion through the administrative process, to be sure, often constitute a desirable approach to settlement of disputes based on sensitive and emotional charges of invidious employment discrimination. We recognize, too, that the filing of a lawsuit might tend to deter efforts at conciliation, that lack of success in the legal action could weaken the Commission's efforts to induce voluntary compliance, and that a suit is privately oriented and narrow, rather than broad, in application, as successful conciliation tends to be. But these are the natural effects of the choice Congress has made available to the claimant by its conferring upon him independent administrative and judicial remedies. The choice is a valuable one." *Johnson* v. *Railway Express Agency Inc.*, 421 U.S. 454, 461 (1975). I dissent from the majority's attempt to limit that choice.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 78-1695

[Filed Oct. 10, 1979]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLEE

vs.

JOSEPH HORNE COMPANY, A Division of Associated Dry Goods Corporation, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ William K. Slate
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 78-1696

[Filed Oct. 10, 1979]

ASSOCIATED DRY GOODS CORPORATION, APPELLEE
vs.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 75-0297-R

[Filed Jul. 18, 1978]

ASSOCIATED DRY GOODS CORPORATION, PLAINTIFF

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., DEFENDANTS

—AND—

Civil Action No. 76-0510-R

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PLAINTIFF

v.

JOSEPH HORNE COMPANY, DEFENDANT

MEMORANDUM

Associated Dry Goods Corporation ("Associated"), plaintiff herein, brings this action to challenge certain practices of defendant Equal Employment Opportunity Commission ("EEOC") relating to disclosure of EEOC investigative files to charging parties. Consolidated with Associated's action is an application by

the EEOC to enforce an EEOC administrative subpoena *duces tecum* against one of Associated's subsidiaries, the Joseph Horne Company ("Horne's"). Jurisdiction is premised upon the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.;* on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.;* and on 28 U.S.C. § 1331.

The facts, briefly stated, are as follows: From November 1971, through June 1973, several employees and former employees of Horne's filed race and sex discrimination charges against Horne's with the EEOC. The EEOC began investigating the charges by serving interrogatories on Horne's in February and April of 1974. Horne's refused to answer the interrogatories without assurances from the EEOC that the answers would not be disclosed to the charging parties, their attorneys, or others. The EEOC could not offer such assurance. Rather, the Commission explained that its policy was to disclose to charging parties both their own case files (including data submitted by the employer in response to Commission interrogatories) and "related case files"—files involving the same employer which were compiled during the investigation of similar charges filed by other individuals. The only conditions attached to such disclosures were that the charging party use the information "in connection with contemplated or pending litigation," and that he or she agree in writing not to make the information public except in the normal course of a civil action or other proceeding instituted under Title VII. The Commission admitted, however, that it had "no

way of preventing charging parties from transmitting information to others.

Lacking the assurance it sought, Horne's continued to withhold the information which the EEOC had requested in its interrogatories. On October 18, 1974, the Commission issued a subpoena for the information. On October 23, 1974, Horne's petitioned for revocation of the subpoena, and on May 9, 1975, its petition was denied.

Horne's did not comply with the subpoena. Instead, on June 27, 1975, Associated (Horne's parent company) filed the instant action, challenging the Commission's disclosure policies and seeking declaratory and injunctive relief. The EEOC moved to dismiss the suit. On June 25, 1976, this Court denied in part and sustained in part the Commission's motion to dismiss. *Associated Dry Goods Corp.* v. *EEOC*, 419 F.Supp. 814 (E.D. Va. 1976). By order of July 8, 1976, the Court instructed the parties to brief the sole remaining issue: whether § 706(b) of Title VII, as civilly invoked, prohibited the EEOC from disclosing investigative materials to charging parties.[1] That issue has now been fully briefed. Additionally, the parties have addressed the closely related issue of whether § 709(e) of Title VII prohibits the EEOC

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[1] Plaintiff is not challenging here the EEOC's disclosure of information in response to subpoenas, demands, or orders of courts to other authorities; or in cases where the EEOC is a party to the litigation; or in response to requests made by representatives of interested federal, state or local authorities. In short, plaintiff is not concerned in the instant case with disclosure to other governmental authorities. (Plaintiff's Supplemental Memorandum at 13, n. 16, filed August 9, 1976).

from disclosing investigative materials to charging parties. These issues are now ripe for disposition.

For the reasons which follow, judgment on the merits will be entered in favor of Associated as to the disclosure issues. At the same time, the EEOC's application for enforcement of its investigative subpoena will be granted, subject to the conditions implicit in the Court's holding on disclosure.

I.

Plaintiff specifically challenges the procedural regulations found at 29 C.F.R. §§ 1601.20 [2] and 1610.17 (d),[3] and the EEOC's "special disclosure rules" con-

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[2] 29 C.F.R. § 1601.20, entitled "Confidentiality", provides as follows:

> Neither a charge, nor information obtained pursuant to § 709(a) of Title VII, nor information obtained from records required to be kept or reports required to be filed pursuant to §§ 709(c) and (d) of said Title shall be made matters of public information by the Commission prior to the institution under this Title of a court proceeding involving such charge or information.
>
> *This provision does not apply to such earlier disclosures to the charging party,* the respondent, witnesses, and representatives of interested federal, state and local agencies as may be appropriate or necessary to the carrying out of the Commission's functions under the Title, nor the publication of data derived from such information in a form which does not reveal the identity of the charging party, respondent or persons supplying the information. [Emphasis added.]

[3] 29 C.F.R. § 1620.17(d) provides as follows:

> *Special disclosure rules apply to the case files for charging parties,* aggrieved persons on whose behalf a

tained in § 83 of the EEOC Compliance Manual.[4] Under these rules and regulations, the EEOC may

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charge has been filed, and entities against whom charges have been filed. Special disclosure rules are available in the public reading areas of the Commission. Under §§ 706 and 709, case files involved in the administrative process of the Commission are not available to the public. [Emphasis added.]

[4] Section 83 of the EEOC Compliance Manual, in pertinent part provides as follows:

Disclosure of Information in Case Files

83.1 *General*—Section 709(e) of Title VII makes it unlawful for any employee of the Commission to make public information obtained by the Commission pursuant to its general authority to investigate charges of discrimination prior to the institution of any proceeding under Title VII. The Fifth Circuit Court of Appeals has held (*Kessler* v. *EEOC*, 472 F.2d 1147 (5th Cir. 1973)) that granting access to such information to charging parties or their attorneys prior to the institution of a proceeding under Title VII is not "making public" within the meaning of that term as used in § 709(e).

. . .

83.3 *Conditions Precedent to Disclosure.* Information in case files may be disclosed on request to the persons indicated in 83.5 under the following conditions:

(a) *In Connection with Pending or Contemplated Litigation.* Information in case files may be disclosed provided that the request is made for the purpose of reviewing information in the case file in connection with pending or contemplated litigation. Access to the information will not be granted prior to the expiration of the 180-day period prescribed at Section 706(f)(1) of Title VII except when the charge has been dismissed or the aggrieved or charging party demonstrates a compelling need for access prior to the expiration of the 180-day period; and

(b) *Persons Requesting Disclosure Must Agree Not to Make the Information* Public. Information in case

furnish materials from its investigative files to employees contemplating private Title VII litigation against employers under investigation by the Commission. It is the plaintiff's contention that this practice contravenes the statutory nondisclosure provisions found at §§ 706(b) and 709(e) of Title VII.

Section 709(e) of Title VII, 42 U.S.C. § 2000e-8(e), provides, in pertinent part:

> It shall be unlawful for any officer or employee of the Commission to *make public in any manner whatever* any information obtained by the Com-

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files may be disclosed only on the condition that the persons requesting disclosure agree in writing not to make the information obtained public except in the normal course of a civil action or other proceeding instituted under Title VII.

83.5 *Persons to Whom Information In Case Files May Be Disclosed.* Information in case files may be disclosed on request, after complying with the expunction requirements discussed in 83.6, to *only* the following persons:

(a) Charging Parties and their attorneys (except as otherwise provided in 83.5(c) below);

(b) Aggrieved persons in case files involving Commissioner Charges and their attorneys provided that such persons have been notified of their status as aggrieved persons pursuant to Section 1601.25(c) of the Commission's Procedural Regulations;

(c) Persons or organizations filing on behalf of an aggrieved person, provided that the aggrieved person has given written authorization to the persons who filed on his or her behalf to act as the aggrieved person's agent for this purpose and their attorneys;

. . .

(e) Respondents and their attorneys, provided that the charging party or aggrieved person has filed suit under Title VII.

> mission pursuant to its [investigative] authority . . . prior to the institution of any proceeding under this subchapter involving such information. [Emphasis added.]

The crucial phrase with respect to the case at bar is "make public". The EEOC argues that charging parties are not members of the "public" for purposes of § 709(e). Thus, the EEOC takes the position that § 709(e) does not bar it from disclosing to charging parties information obtained pursuant to the Commission's statutory investigative powers.

The Court rejects the EEOC's contentions in this regard. The Court's reasoning is aptly expressed by the United States Court of Appeals for the District of Columbia Circuit in the case of *Sears, Roebuck & Co.* v. *EEOC*, Nos. 77-1822, 77-1995 and 77-1996, 16 E.P.D. ¶ 8348 (D.C. Cir., June 9, 1978). Facing nearly the identical issue posed in the instant case, the District of Columbia Circuit stated:

> An examination of the overall statutory scheme persuades us that Title VII was never meant to permit dissemination of EEOC investigative data to anyone not within the government.
>
> . . . It would do violence to the scheme of negotiation and settlement if the Commission were permitted to encourage numerous private litigants by distributing information from EEOC files before the administrative procedures of Title VII had run their course.

16 E.P.D. ¶ 8348, at 5835.

The District of Columbia Circuit also noted in *Sears* that the EEOC had no effective means of con-

trolling the manner in which charging parties used information which they obtained from the Commission's files:

> Although the Commission extracted promises from the requesting parties with respect to some of the information it proposed to distribute in the instant case, such promises obviously are not enforceable against those receiving information. . . . As there is nothing to prevent charging parties from redistributing what they receive from the EEOC to whomever they please, distribution of investigative file data to charging parties would be tantamount to distribution to the public at large.

16 E.P.D. § 8348 at 5836.

Finally, the *Sears* opinion distinguished *H. Kessler & Co.* v. *EEOC*, 472 F.2d 1147 (5th Cir.) (*en banc*), *cert. denied*, 412 U.S. 939 (1973), formerly the leading case interpreting § 709(e). That case held that an individual charging party could be given access to his own EEOC investigative file. The District of Columbia Circuit expressly declined to extend the *Kessler* holding to a situation involving numerous requests by parties bringing related charges, as opposed to the single request by the initial charging party involved in *Kessler*. Moreover, the *Sears* opinion implied that *Kessler* itself might no longer be viable in light of the 1972 amendments to Title VII, none of which were considered in that case. For the same reasons, the Court is of the view that *Kessler* is inapplicable to the case at bar.

In summary, the Court of Appeals for the District of Columbia Circuit held in *Sears* that § 709(e) of Title VII prohibited the EEOC from disclosing its investigative files to anyone outside the government, including charging parties.

The District of Columbia Circuit reached a parallel conclusion in reference to § 706(b) of Title VII, 42 U.S.C. § 2000e-5(b). That section provides, in relevant part:

> Nothing said or done during and as a part of . . . informal endeavors [at conciliation], may be *made public* by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. [Emphasis added.]

Observing that § 706(b) uses essentially the same "make public" language found in § 709(e), and finding no reason to construe the two provisions differently, the Court of Appeals held that § 706(b) prohibited the EEOC from disclosing to parties outside the government any information gleaned from settlement or conciliation negotiations.

This Court finds the reasoning of the District of Columbia Circuit in its *Sears* decision to be persuasive. Moroever, by facilitating and encouraging the conciliation process, the *Sears* interpretation of §§ 706 (b) and 709(e) is in complete harmony with the Fourth Judicial Circuit's recognition that the EEOC's statutory duty to attempt conciliation "is among its most essential functions." *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 272 (4th Cir. 1976).

Consequently, this Court adopts the view stated in *Sears* and will enter judgment on the merits in favor of the plaintiff regarding the validity of the EEOC rules and regulations at issue here.[5]

II.

It remains to consider whether the EEOC's application for enforcement of its subpoena *duces tecum* should be granted. While the plaintiff has advanced extensive arguments against enforcement, the

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[5] By letter of June 28, 1978, counsel for the EEOC made the surprising claim that "the United States Court of Appeals for the Fourth Circuit has already decided the issue of 'making public' under Title VII contrary to the decision reached in *Sears, supra.*" In support of this proposition the EEOC cited *Charlotte-Mecklenburg Hospital Authority* v. *EEOC*, 571 F.2d 195 (1978). The Court has carefully reviewed the *Charlotte-Mecklenburg* case and finds no support for any such contention. *Charlotte-Mecklenburg* was a Freedom of Information Act ("FOIA") case. While §§ 706(b) and 709(e) of Title VII figured in the opinion, disclosure policy regarding investigative files was not in issue because both litigants agreed that Title VII permitted certain disclosures to the charging party and the charged employer. In that posture the case hinged on exemption three of the FOIA and the Court had no reason to analyze the "make public" language of §§ 706(b) and 709(e).

To the extent that *Charlotte-Mecklenburg* does contain an implicit holding on §§ 706(b) and 709(e), however, it is only that certain disclosures from investigative files are permissible to charged *employers*. The decision contains no similar implication regarding charging employees. Indeed, the court apparently left open the issue faced in the instant case, noting that while Title VII did not appear to bar disclosure to a charged employer, "it may prohibit disclosure to some other party." 571 F.2d at 200-201 (footnote omitted).

Court is of the view that the application should be granted.

The EEOC applied for the enforcement of its administrative subpoena *duces tecum* against Horne's on May 24, 1976, in the United States District Court in Pittsburgh, Pennsylvania. On September 28, 1976, that court transferred the enforcement action to this Court for consolidation with the pending action filed by Associated. On March 1, 1977, this Court issued an order effecting consolidation.

The subpoena in question directs Horne's to produce certain records which the EEOC considers relevant to its investigation of specified charges of unfair employment practices against Horne's. Plaintiff's arguments against enforcement will be considered seriatim.

Plaintiff's first contention is that the EEOC never formally approved its Compliance Director's determination on Horne's petition to revoke the subpoena. There is no question that the subpoena was properly issued, that Horne's filed a timely petition to revoke same, and that the EEOC Director of Compliance denied the petition to revoke. Plaintiff's argument focuses on the next step in the administrative process, the full Commission's review and approval of the Compliance Director's denial of the petition. Pursuant to 29 C.F.R. § 1601.15(b), the determination of the Director of Compliance "shall be reviewed by the Commission and unless the Commission decides otherwise shall become final three days thereafter." The heart of plaintiff's argument here is that the

determination of the Director of Compliance was never actually "reviewed by the Commission" because, whereas it takes three members of the Commission to constitute a quorum, only two members apparently reviewed the determination by the Director of Compliance. Thus, plaintiff contends, no Commission action ever occurred with respect to Horne's petition to revoke the subpoena.

The Court is not impressed by this contention. While it may be factual that review of the Compliance Director's determination was conducted by less than a quorum of the Commission, the third Commissioner's absence was in the Court's view immaterial because his vote would not have affected the result. The two votes approving the Compliance Director's determination would most likely have prevailed in any event.[6] Consequently, the Court con-

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[6] Associated's position as set forth in their memorandum filed February 11, 1977, at p. 28, n.64, is as follows:

> Since a single Commissioner may request that a "hold" be placed on any proposed Determination in order to bring the case before the Commission, the failure to have a statutory quorum review the Director of Compliance's suggested disposition may have a decisive impact upon the outcome of the petition.

[Citing EEOC Compliance Procedures Manual, § 24.4(6).]

This position loses viability in light of the fact that the Commission was not at full strength during the relevant time period. Indeed, as Associated recognizes, there were only two active commissioners at the time the Compliance Director's determination was reviewed. Two of the five allocated positions were vacant, and the third commissioner had been hospitalized as a result of a heart attack. Thus, even if the two

siders the apparent deviation from Commission regulations to be *de minimus*, and therefore insufficient grounds for denying enforcement of the Commission's subpoena.

The plaintiff's second argument against enforcement is that the EEOC should be precluded from pursuing its own investigation with respect to charges which are the subject of private Title VII actions. This contention is also unpersuasive. The very case

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active commissioners had waited for the third commissioner to recover, or for a new commissioner to be confirmed, the third commissioner could at best have brought the Horne's petition before the Commission which would have been composed of himself and the two commissioners who had already endorsed the Compliance Director's determination. This is quite different from the normal situation, when the Commission is functioning with its full complement of five active commissioners, for in that situation a third commissioner's "hold" can bring the petition before at least two commissioners who have not yet reviewed the Compliance Director's determination. In that case, a third commissioner's review might often be decisive.

Assuming that a third commissioner had been available to review the Compliance Director's determination, however, his review would have been material only *if* he had placed a "hold" on it, and *if* he had maintained his disagreement with the Compliance Director's determination after hearing the full facts, and *if* one of the other commissioners had joined him by withdrawing his original approval of the subpoena. Only then would Horne's petition to revoke the subpoena have been granted. This set of possibilities is in the Court's view too tenuous to serve as grounds for denying enforcement of the EEOC's subpoena, especially in view of the problems facing the Commission at that time. Congress cannot have intended that the Commission be paralyzed during the entire time it operated with only two active commissioners.

cited by plaintiff in support of its proposition, *EEOC* v. *Duval Corp.*, 528 F.2d 945 (10th Cir. 1976) explicitly states that the EEOC has the right to intervene in any pending private Title VII action. The United States Court of Appeals for the Third Circuit has gone even further, holding that the EEOC has the authority to bring an independent action, even if it is based on the same facts or charges as a previously instituted private Title VII suit. *See EEOC* v. *North Hills Passavant Hospital*, 544 F.2d 664, 672 (3d Cir. 1976). In light of the Supreme Court's holding in *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355 (1977), that EEOC actions are not subject to any statute of limitations, intervention or independent action by the EEOC with respect to the private litigation under way against Horne's remains a realistic possibility. The fact that private litigation is pending therefore provides no grounds for denying enforcement of the EEOC investigative subpoena.

Plaintiff's final argument is that enforcement of the subpoena should be denied on grounds of laches. It is the law of this Judicial Circuit that laches will not bar enforcement of an EEOC investigative subpoena "when neither prejudice to the employer nor misconduct by the agency has been established." *EEOC* v. *South Carolina National Bank*, 562 F.2d 329, 333 (4th Cir. 1977). *Accord, EEOC* v. *Exchange Security Bank*, 529 F.2d 1214, 1216-17 (5th Cir. 1976). Plaintiff alleges both prejudice and agency misconduct, but its arguments must fail.

Regarding prejudice, plaintiff's position is that because the EEOC delayed in seeking enforcement of its subpoena, Horne's has been forced to defend simultaneously against the private litigation and the EEOC enforcement action for many months. Since the EEOC has the right to continue its investigative efforts after private litigation has been initiated, however, *see EEOC* v. *North Hills Passavant Hospital*, *supra*, the alleged prejudice results not from the EEOC's delay in seeking enforcement, but rather from the extent of the EEOC's investigative authority under Title VII. Such "prejudice" is not grounds for this Court to deny enforcement of an EEOC subpoena.

Regarding agency misconduct, plaintiff notes that the EEOC, upon bringing its enforcement action in the United States District Court in Pittsburgh, failed to inform that court that it was already defending a related action pending in this Court. Moreover, plaintiff points out that although the EEOC urged this Court to dismiss Associated's action for lack of subject matter jurisdiction on grounds that the Commission had not yet moved to enforce its subpoena, the EEOC failed to notify this Court when the enforcement action was filed in Pittsburgh. In the same vein, plaintiff urges that the eleven month delay between the filing of Associated's action in this Court and the filing of the EEOC's enforcement action in Pittsburgh was motivated by the Commission's desire to gain a tactical advantage in its motion to dismiss Associated's pending action in this Court. Finally,

plaintiff cites certain procedural irregularities in the issuance of the subpoena, including the lack of a quorum in reviewing the Compliance Director's determination, a matter which the Court has already dismissed as immaterial. While the Court would characterize the procedure of the Commission in issuing and enforcing this subpoena as unusual, the Court is not satisfied that such procedure sinks to the level of "misconduct" warranting denial of enforcement of an EEOC subpoena.

As plaintiff has established neither prejudice nor misconduct to the satisfaction of the Court, the EEOC's application for enforcement of its subpoena *duces tecum* will be granted. Disclosure of the information obtained via the subpoena will, of course, be limited by the Court's decision regarding §§ 706(b) and 709(e) of Title VII.

III.

Finally, the Court must address plaintiff's request for an award of reasonable counsel fees and other litigation costs in connection with its defense against the EEOC's subpoena enforcement action. Under § 706(k) of Title VII, such fees can properly be awarded only to a "prevailing party". 42 U.S.C. § 2000e-5(k). Since plaintiff has not prevailed in its efforts to deny enforcement of the subpoena, this Court is without authority to award attorney's fees as requested.

IV.

To summarize the Court's holdings:

(1) The EEOC's application to enforce its investigative subpoena *duces tecum* will be granted;

(2) The EEOC is prohibited from disclosing the information so obtained to any charging party, and any EEOC rules and regulations to the contrary are invalid; and

(3) Plaintiff's request for attorney's fees will be denied.

An appropriate order will issue.

/s/ Robert R. Merhige, Jr.
ROBERT R. MERHIGE, JR.

United States District Judge

Date: Jul 18 1978

APPENDIX E

EEOC COMPLIANCE MANUAL
SECTION 83

DISCLOSURE OF INFORMATION IN CASE FILES

83.1 *General*—Section 709(e) of Title VII makes it unlawful for any employee of the Commission to make public information obtained by the Commission pursuant to its general authority to investigate charges of discrimination prior to the institution of any proceeding under Title VII. The Fifth Circuit Court of Appeals has held (*Kessler* v. *EEOC* 472 F.2d 1147 (5th Cir. 1973) that granting access to such information to charging parties or their attorneys prior to the institution of a proceeding under Title VII is not "making public" within the meaning of that term as used in Section 709(e).

83.2 *Exceptions*

(a) *Disclosure of Information in Response to Subpoenas, Demands or Order of Courts or Other Authorities*—The procedures and policies of this section do not apply to disclosures of information from case files in response to subpoenas, demands or orders of courts or other authorities. The procedures in subpart B of the Commission's Regulations on Availability of Records (29 CFR 1610.30 through 1610.36) are to be followed in these circumstances.

(b) *Disclosure of Information When the Commission is a Party to Litigation*—Once a case file has been referred to Office of General Counsel to be used in litigation to which the Commission is a party or in any other case where the Commission is a party to litigation, the Office of General Counsel will control disclosures of information and all persons requesting disclosure from District Offices or Office of Systemic Programs (OSP) will be referred to the Office of General Counsel as provided in Section 1610.34 of the Commission Regulations.

(c) *Disclosures of Information in Case Files to Representatives of Interested Federal, State or Local Authorities*—The procedures and policies of this section do not apply to disclosures of information in case files to representatives of interested Federal, State or local agencies. Such disclosures are to be made as appropriate and necessary to carrying out the Commission's responsibilities under the law in accordance with Section 709(b) of Title VII and Section 1601.22 of the Commission's Procedural Regulations.

83.3 *Conditions Precedent to Disclosure*—Information in case files may be disclosed on request to the persons indicated in 83.5 under the following conditions:

(a) *In Connection With Pending or Contemplated Litigation*—Information in case files may be disclosed provided that the request is made for the

purpose of reviewing information in the case file in connection with pending or contemplated litigation. Access to the information will not be granted prior to the expiration of the 180 day period prescribed at Section 706(f)(1) of Title VII except when the charge has been dismissed, the aggrieved or charging party demonstrated a compelling need for access prior to the expiration of the 180 day period; or if aggrieved person has been issued a requested Notice of Right to Sue.

(b) *Persons Requesting Disclosure Must Agree not to Make the Information Public*—Information in case files may be disclosed only on the condition that the person requesting disclosure agree in writing not to make the information obtained public except in the normal course of a civil action or other proceeding instituted under Title VII.

83.4 *Use of EEOC Form 167, Agreement of Nondisclosure (See Exhibit 83-A)*—Each person to whom disclosure is made will sign a separate EEOC Form 167, Agreement of Nondisclosure, check the appropriate block to indicate identification and provide a complete address and telephone number. Completion of EEOC Form 167 will be accepted as evidence that the conditions in 83.3 are agreed to by the person requesting disclosure. The Commission representative who signs the EEOC Form 167 on behalf of the Commission will normally be the District Counsel, District Director or other responsible professional employee in a supervisory position. Re-

tain the original in the case file. A copy may be provided to the person requesting disclosure, if requested.

83.5 *Persons to Whom Information in Case Files May be Disclosed*—Information in case files may be disclosed on request, after complying with the expunction requirements discussed in 83.6, to *only* the following persons:

(a) Charging Parties and their attorneys (except as otherwise provided in 83.5(c) below);

(b) Aggrieved persons in case files involving Commissioner Charges and their attorneys provided that such persons have been notified of their status as aggrieved persons by the Commission;

(c) Persons or organizations filing on behalf of an aggrieved person, provided that the aggrieved person has given written authorization to the person who filed on his or her behalf to act as the aggrieved person's agent for this purpose and their attorneys;

(d) Employees of Commission funded groups such as the Mexican-American Legal Defense and Education Fund and Lawyer's Committee for Civil Rights Under Law for the purpose of reviewing information in case files to determine the appropriateness of referral to private attorneys as a service to charging parties, provided that the conditions in 83.4 and 83.6 have been met and that the Commission funded group is reviewing the information at the request of the charging party;

(e) Respondents and their attorneys, provided that the charging party or aggrieved person has filed suit under Title VII; and

(f) Any party in a class action complaint, provided that such party is actually named in the complaint as filed in Federal district court or is actually named by court order as a class member.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

AGREEMENT OF NONDISCLOSURE

Pursuant to Section 705g(1) of Title VII, the EEOC shall have power to cooperate with private individuals in order to accomplish the purposes of Title VII.

PERSON REQUESTING DISCLOSURE

☐ CHARGING PARTY	☐ RESPONDENT	☐ AGGRIEVED PERSON ON WHOSE BEHALF CHARGE IS FILED	☐ AGGRIEVED PERSON IN COMMISSIONER CHARGE	☐ NAMED PARTY IN CLASS ACTION

ATTORNEY REPRESENTING

☒ CP ☐ RESPONDENT ☐ AGGRIEVED PERSON ON WHOSE BEHALF CHARGE IS FILED ☐ AGGRIEVED PERSON IN COMMISSIONER CHARGE ☐ NAMED PARTY IN CLASS ACTION

CASE CHARGE NUMBER OF FILE(S) TO BE DISCLOSED

YPB4-1151 and YPB4-1152

STATEMENT

I John V. Evans (Typed name), request disclosure of Commission case file(s) in connection with contemplated or pending litigation. I agree that the information disclosed to me will not be made public or used except in the normal course of a civil action or other proceeding instituted under Title VII involving such information.

In witness whereof, this agreement is entered into as of the 5th day of May 19 75, by the Equal Employment Opportunity Commission representative named below and the person requesting disclosure.

John V. Evans 999-919-1010

Requesting disclosure (Signature and telephone number/area code)

Lopez, Evan and Fenwick, 1802 Dawn St., Point Barrow, Alaska 99999

Complete address

Jane Jones

Jane Jones, District Counsel, Point Barrow District Office

EEOC representative (Signature and title)

EEOC FORM MAY 75 167

Exhibit 83-A

83.6 *Expunction of Confidential Material From Case Files Prior to Disclosure*

(a) *General*—Expunction of confidential material pursuant to this section will be strictly supervised by the District Counsel or Litigation Enforcement Division staff in OSP, the District Director, Director of the Office of Systemic Programs or another responsible professional employee in the absence or non-availability of an attorney or the District Director. Supervision of expunction will not be further sub-delegated to non-professionals.

(b) *Statements and Identities of Witnesses Promised Anonymity*—Remove any information concerning the identities of and statements by witnesses who have been promised anonymity by a Commission representative during the course of investigation or conciliation. The statements of such witnesses are to be clearly marked by the Commission representative who promised anonymity by placing the words "Confidential Witness—Do Not Disclose this Statement" at the top and bottom of each page of each statement. The confidential witness's name is to be followed by the words "Confidential Witness" when used on the index to tabs in the case file. The name is to be obscured and the index photocopied so that only the words "Confidential Witness" appears on the index provided to persons requesting disclosure. A similar procedure is to be followed each place the confidential witness's name or information obtained from the witness appears in the case file.

(c) *Review Sheet on Commission Decisions*—Remove the review sheet covering Commission Decisions before disclosure because this review sheet records information concerning intra-governmental advisory and deliberative communications.

(d) *Intra-Agency and Inter-Agency Memoranda*—Remove the Investigator's Memorandum. Remove all memoranda, notes and other documents prepared by Commission attorneys or received from other governmental agencies which contain recommendations or mental impressions as to strategy for settling the case or litigation. Remove all memoranda or notes from Regional Office of the General Counsel, from Office of General Counsel and from the Department of Justice.

(e) *Any Data on Other Respondents*—Remove all data naming other respondents which may be contained in the case file. The names of other respondents usually will be contained on EEOC Form 155, if charging party has filed charges against other respondents or on deferral correspondence which sometimes includes lists of charges deferred. The name of other respondents is to be obscured from such documents before disclosure.

(f) *Conciliation Materials*—Remove information in the case file which concerns the Commission's attempts to settle the charge by the informal methods of conference, conciliation and persuasion but see also Section 1601.26(b) of the Commission's Procedural Regulations which provides that factual information obtained by the Commission during the

course of such informal endeavors may be disclosed provided that the factual information was otherwise obtainable by the Commission under its authority in Section 709 of Title VII.

Materials which *must* be removed include: EEOC Form 134, Conciliation Case Analysis; EEOC Form 159, Log of Investigative/Settlement Actions, EEOC Form 180, Conciliation Benefits; Commission, Charging Party and Respondent proposals and counter proposals (and all correspondence or other documents which contain information customarily contained in the items cited) and any statement by any party which could be construed as an admission against interest. EEOC Form 153, Invitation to Participate in Settlement Discussions, will be disclosed. If in doubt as to whether or not the factual information obtained during informal endeavors to settle the charge is obtainable under the Commission's investigatory powers, remove the information.

(g) *Information Obtained From OFCCP or Contract Compliance Agencies Under the EEOC/OFCCP Memorandum of Understanding*—All information obtained from OFCCP or any of its constituent contract compliance agencies pursuant to the Memorandum of Understanding, paragraph 5, will be removed. (See also 28-13 and 83.7(b)).

83.7 *Scope of Disclosure Permitted*

(a) *Employer Information Reports (EEO-1) or other Reports Prescribed by the Commission Pursuant to Section 709(c)*—All reports required by the

Commission from respondents covered by Title VII such as Employer Information Report (EEO-1, State and Local Government Information Report (EEO-4)) will be disclosed if available in the District Office or Office of Systemic Programs notwithstanding the fact that these reports were not actually in the charging party's case file.

(b) *Information in Case Files Obtained From OFCCP or Contract Compliance Agencies Under the EEOC/OFCCP Memorandum of Understanding*— Paragraph 5 of the Memorandum of Understanding between EEOC and OFCCP signed September 11, 1974 provides as follows:

> "All requests by third parties for the disclosure of information shall be referred to the agency which initially compiled or collected the information."

All information obtained from OFCCP or its constituent contract compliance agencies pursuant to this agreement will not be disclosed. Persons, as defined under Section 83.5, who are entitled to disclosure under Section 83.3 will be informed that the OFCCP material in the file can be requested directly from the Office of Federal Contract Compliance Programs and will be provided with page numbers or other identifying information to aid in making such requests. Requests for information by any persons made under the Freedom of Information Act and not under Section 83 will be referred to the agency which initially compiled or collected the information in accordance with Section 1610.6 of the Commission regulations and

the EEOC Order 151, Disclosure of Information Under the Freedom of Information Act (but also see 83.2(c)).

(c) *Other Case Files Involving the Same Respondent*

(1) *General*—The Commission's policy is to cooperate with private Title VII litigants and to lend appropriate assistance in framing proper court complaints by allowing, when requested, access to information in other case files involving the same respondent which are available in the same District Office or Office of Systemic Programs, provided that the information in the other case files is relevant or material to the private litigant's case.

(2) *Determining When Information in Other Case Files is Relevant or Material*—Information in other case files is relevant or material when other case files contain charges, investigations or determinations involving the same basis (e.g. sex, religion, national origin, race) with limited exceptions such as when the private litigant's case alleged discrimination in promotion against females and the other case file involved a male's claim that he was not hired because of respondent's policy of not hiring long haired males. Other case files may be relevant or material if they involve a different basis only when the treatment afforded one protected class is probative of treatment afforded the private litigant's class (e.g. systemic discrimination against Spanish Surnamed Americans is often probative as to treatment accorded Blacks and vice versa).

(3) *Safeguard the Identity of Person on Whose Behalf Charge was Made When Disclosing Other Case Files Involving the Same Respondent*—Section 1601.7(a) of the Commission's Procedural Regulations provides that the Commission shall safeguard and keep confidential the name and address of any person on whose behalf a charge is made, where the person requests that his or her identity remain confidential. When disclosing information in other case files involving the same respondent, remove any material which would reveal the name or address of any person on whose behalf a charge was made including EEOC Form 151, Third Party Certification of Charge, (or any other document serving the same purpose), the affidavit required by 8.3(c) in which the person on whose behalf a charge is made acknowledges aggrievement or any other documents which contain the name or address of the person on whose behalf a charge was made. When constructing the case file, a procedure similar to that described in 83.6(b) is to be followed, i.e. clearly mark the index tabs in the case file and mark each document which contains information which the Commission is required to safeguard pursuant Section 1601.7(a) of the Commission's Procedural Regulations.

(4) *Safeguard The Identities of Charging Parties When Disclosing Other Case Files Involving the Same Respondent*—When disclosing information in other case files involving the same respondent, remove any materials which would reveal the name or

address (or other identifying details) of any charging party in the other case files.

(5) *District Director or Director, OSP, Decision as to Relevant or Material is Final*—Because the policy of allowing access to information in other case files is discretionary on the part of the Commission, the decision of the District Director or Director, OSP, is final when made and may not be appealed. However, any District Director or Director, OSP, may reconsider on his or her own motion any decision made as to relevancy.

83.8 *Collection and Disposition of Fees For Copying*—Fees for photocopying will be assesed or waived in accordance with the schedule of fees contained at Section 1610.15 of the Commission's Regulations. Collection and disposition of fees will be in accordance with EEOC Order 471. Persons granted access to information in case files will not normally be permitted to remove case files from Commission premises except that the District Director or Director, OSP, may allow a file to be copied away from Commission premises if unusual circumstances warrant and proper safeguards are observed to prevent loss or mutiliation of the file. District Office or Office of Systemic Programs personnel will photocopy materials on request; however, if a request for photocopying involves unusual problems or reproduction or handling, District Director or Director, OSP, may require persons requesting copies to make special arrangements. Persons granted access are to be

encouraged to minimize the amount of photocopying by Commission employees by first carefully inspecting the information in the case file and making a judicious selection of the material to be photocopied.

83.9 *Copy of This Section Will be Provided to Persons Who Sign EEOC Form 167*—A photocopy of this section will be provided to persons who sign an EEOC Form 167 at no cost.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 307747 170

Supreme Court, U. S.
FILED
JUN 10 1980
MICHAEL RODAK, JR., CLERK

JOINT APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1068

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner

—v.—

ASSOCIATED DRY GOODS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED JANUARY 7, 1980
CERTIORARI GRANTED MARCH 17, 1980

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RELEVANT DOCKET ENTRIES

06-27-75 (1) Complaint filed; summonses issued.

07-08-75 (2) Marshals return on summons as to all defendants listed executed and filed.

08-26-75 (3) Deft's Motion to Dismiss with Supporting Memorandum filed.

09-02-75 (4) ORDERED that Pltf. may have up to & including 09/29/75 in which to file response to Deft's Motion to Dismiss, ENTERED by RRM on 09/02/75 & filed. Copies mailed.

09-25-75 (5) ORDER that Pltf may have up to & including 10/31/75 within which to file its response to Deft's Motion to Dismiss, ent. 9/25/75, RRM, filed. Copies mailed.

10-10-75 (6) ORDERED that Deft. may file Answer within 10 days after Court finally rules on Deft's Motion to Dismiss, ENTERED on 10/10/75 & filed. Copies mailed.

10-31-75 (7) Pltf's Memorandum in Opposition to Motion to Dismiss Complaint, filed.

12-01-75 (8) Memorandum of Points and Authorities in Reply to Pltf's Memorandum in Opposition to Deft's Motion to Dismiss, filed.

06-25-76 (9) Court's Memorandum and ORDER denying deft's motion to dismiss in part and sustaining Deft's motion to dismiss in part, ent. 6-25-76, RRMjr, filed. Copies mailed.

07-08-76 (10) ORDERED parties to action brief within 15 days from entry of this Order issue of whether Civil Rights Act of 1964, ENTERED by RRMjr on 07/08/76 & filed. Copies mailed to all counsel of record.

07-14-76 (11) ORDER that the parties may have until 8/8/76 in which to file their briefs, ent. 7/14/76, RRM, filed. Copies mailed.

07-28-76 (12) Pltf's Memorandum in Support of Motion to Join Parties Deft and Amend Complaint, filed.

07-28-76 (13) Pltf's Motion to Join Parties and Amend Complaint, filed.

08-09-76 (14) Deft's Memorandum of Points and Authorities in Support of Deft's Position on the Merits, filed.

08-09-76 (15) Pltf's Supplemental Memorandum Following Decision on Motion to Dismiss, filed.

08-24-76 (16) ORDERED Motion to join parties Deft & amend complaint filed by Pltf on 07/28/76 is hereby GRANTED; Defts directed to respond to amended complaint within 20 days from entry of this Order, ENTERED by RRMjr on 08/24/76 & filed. Copies mailed to all counsel of record.

08-25-76 (17) Pltf's Amended Complaint for declaratory judgment & injunction, filed.

08-26-76 (18) Summons issued on Amended Complaint.

08-27-76 (19) ORDER allowing Defts 20 days from service to respond to amended complaint ent. 8-27-76, RRM, JR., filed. Copies mailed.

09-20-76 (20) Defts' Motion for Extension of Time, filed.

09-20-76 (21) ORDERED Defts have until 09/23/76 in which to respond to amended complaint, ENTERED by RRMjr on 09/20/76 & filed. Copies mailed to all counsel of record.

09-23-76 (22) Defts' Answer, filed. No jury demand.

11-16-76 (23) Pltf's Motion for Relief from Order, filed.

11-16-76 (24) Pltf's Memorandum in Support of Motion for Relief from Order, filed.

11-22-76 (25) Defts' Memorandum in Support of Defts' Position on Merits, filed.

11-23-76 (26) ORDERED Defts may respond within 10 days to Pltf's motion for relief, ENTERED by RRMjr on 11/23/76 & filed. Copies mailed to all counsel of record.

12-07-76 (27) ORDER allowing Pltf until 1-22-77 to file response to Dft's memorandum ent. 12-7-76, RRM,JR., filed. Copies mailed.

12-14-76 (28) Pltf's Interrogatories to Defendants, filed.

01-05-77 (29) ORDER that time for Pltf's response to Defts' Memorandum in Support of Defts' Position on Merits extended to 1-31-77, ent. 1-6-77, RRMjr, filed. Copies mailed.

02-01-77 (30) ORDERED time for Defts to answer interrogatories extended to 01/31/77 & time for Pltf. to file memorandum on merits extended to 02/14/77, nunc pro tunc 01/31/77, ENTERED by RRMjr on 02/01/77 & filed. Copies mailed to all counsel of record.

02-04-77 (31) Deft's Answers to Pltf's Interrogatories, filed.

03-01-77 (32) ORDER, consolidating CA-76-0510 with this case. Entered by RRM, jr., on 03/01/77 & filed. Copies mailed to all counsel of record.

04-01-77 (33) EEOC's Supplemental Response in Support of Deft's Position on the Merits, filed.

02-11-78 (34) Pltfs' reply memorandum, received (no certificate).

07-18-78 (35) Memorandum of the Court filed.

07-18-78 (36) ORDER granting in CA 76-0510-R, EEOC's application for enforcement of adm. subpoena duces tecum; judgment on merits in CA 75-0297-R hereby entered in favor of the Pltf, Assoc. Dry Goods Corp; voiding EEOC procedural regulations of charging parties any information in EEOC investigative files; enjoining Commission from making such disclosures; denying request of Pltf, Assoc. Dry Goods, for atty's fees & costs in defending against EEOC's action to enforce subpoena duces tecum ent. 7-18-78, RRM,JR., filed. Copies mailed.

08-01-78 (37) Joseph Horne Co.'s Notice of Appeal in CA 76-0510-R, filed.

08-01-78 (38) Joseph Horne Co.'s Motion for Stay of Order Pending Appeal and for Interim Relief, filed.

08-04-78 (39) ORDER that Respondent-Appellant's application for stay pending appeal GRANTED, ent. 8-3-78, RRMjr., filed. Copies mailed.

08-10-78 (40) Defts' Notice of Appeal, filed. (No fees received).

08-10-78 (41) Defts' Motion for Stay Pending Appeal, filed.

08-10-78 (42) Defts' Memorandum in Support of Motion for Stay, filed.

08-14-78 (43) Pltf-Appellee's Answer to Defts-Appellants' Motion For Stay Pending Appeal, filed.

08-16-78 (44) ORDER, that Defts-Appellants' motion for stay pending appeal of Order of Court dated 07/18/78 is GRANTED, but only to the extent it pertains to proceedings and records involving parties other than Associated Dry Goods Corp. or its divisions, including the Joseph Horne Co. Entered by RRM,JR., on 08/16/78 & filed. Copies mailed.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 75-0297-R

ASSOCIATED DRY GOODS CORPORATION, PLAINTIFF

—*v.*—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC), and ETHEL B. WALSH, individually and as "Acting Chairman," and permanent Vice Chairman of the EEOC, DANIEL E. LEACH, individually and as Member of the EEOC, COLSTON A. LEWIS, individually and as Member of the EEOC, RAYMOND L. TELLES, individually and as Member of the EEOC, ALVIN L. GOLUB, individually and as Acting Executive Director of the EEOC, ABNER W. SIBAL, individually and as General Counsel of the EEOC, EDUARDO PENA, Jr., individually and as Director of Compliance of the EEOC, and EUGENE V. NELSON, individually and as District Director, Pittsburgh, Pennsylvania, District Office, of the EEOC, DEFENDANTS

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

Associated Dry Goods Corporation, by its attorneys, for its complaint against the Defendants allege, as follows:

AS AND FOR A FIRST SEPARATE AND DISTINCT CAUSE OF ACTION

NATURE OF THE ACTION

1. This is a civil action seeking declaratory, injunctive and other relief. Plaintiff seeks a judgment declaring that confidential business records of the Plaintiff, subpoenaed by Defendants during their administrative investigations,

should not be disclosed to the charging parties, their attorneys or any other person. In addition, Plaintiff seeks an injunction against such disclosure.

BASES OF JURISDICTION

2. Jurisdiction of this Court is founded upon the Freedom of Information Act (F.O.I.A.), as amended, 5 U.S.C. § 552 (1974); the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.*, 701, *et seq.*; Title 28 U.S.C. §§ 1331, 1337, 1651; the Declaratory Judgment Act, as amended, 28 U.S.C. §§ 2201-2203; Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* (1972); and, the Trade Secrets Act, 18 U.S.C. § 1905.

3. The matters in controversy exceed the sum of $10,000.00, exclusive of interest and costs, and arise under the laws of the United States.

THE PARTIES

4. Plaintiff, Associated Dry Goods Corporation, (ADG) is a Virginia corporation incorporated in the City of Richmond. It owns and operates numerous retail department stores throughout the United States.

5. The Joseph Horne Company (hereinafter referred to as "Horne's") is a division of ADG authorized to do business in the Commonwealth of Pennsylvania, where it operates several retail department stores in the metropolitan Pittsburgh vicinity.

6. Defendant Equal Employment Opportunity Commission (hereinafter referred to as the "E.E.O.C.") is an administrative agency of the Federal Government, created under the authority of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*

(a) Defendant E.E.O.C. is an "agency" within the meaning of § 551(1) of the Administrative Procedure Act, 5 U.S.C. § 551(1), and § 552(e) of the F.O.I.A., as amended, 5 U.S.C. § 552(e) (1974).

(b) Defendant E.E.O.C. has its principal offices and place of business in the City of Washington, District of Columbia.

6-1. (a) The individual defendants include the "Acting Chairman" and permanent Vice Chairman, and Commissioners of the E.E.O.C., and named officers, agents or employees of the E.E.O.C., as follows:

(1) ETHEL B. WALSH is "Acting Chairman" and permanent Vice Chairman of the E.E.O.C.;

(2) DANIEL E. LEACH, COLSTON A. LEWIS, and RAYMOND L. TELLES are Members of the E.E.O.C.;

(3) ALVIN L. GOLUB, is Acting Executive Director of the E.E.O.C.;

(4) ABNER W. SIBAL is General Counsel of the E.E.O.C.;

(5) EDUARDO PENA, JR., is Director of Compliance of the E.E.O.C.;

(6) EUGENE V. NELSON is District Director for the Pittsburgh, Pennsylvania, District Office of the E.E.O.C.

(b) Upon information and belief, all of the individual Defendants named in subparagraph (a) of this paragraph maintain their offices at the E.E.O.C's principal offices located in the City of Washington, District of Columbia, except for Defendant Eugene V. Nelson, whose offices are located at 1000 Liberty Avenue, Pittsburgh, Pennsylvania.

(c) The Defendant E.E.O.C. and the said individual Defendants are hereinafter referred to as "Defendants".

(d) The Defendants and each of them are authorized to exercise only such powers as are conferred upon them by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, and lawful regulations issued pursuant to § 713 of said statute, 42 U.S.C. § 2000e-12(a), and then only in the manner prescribed therein.

FACTUAL ALLEGATIONS

7. Upon information and belief, the following individuals who were employed at Plaintiff's Horne's di-

vision at all material times, filed charges with the Defendant E.E.O.C.:

Charging Party	Date Charge Filed	Basis For Charge
1. Katherine Murray	November 16, 1971	Race Discrimination
2. Helen Pollock	January 3, 1972	Sex Discrimination
3. Mary Kritko	January 17, 1972	Sex Discrimination
4. Lois Blake	February 15, 1972	Sex Discrimination
5. Marlene Denk	February 28, 1972	Sex Discrimination
6. Marsue Dingley	June 6, 1973	Sex Discrimination
7. Alice M. Corvino	April 28, 1973	Sex Discrimination

8. In or about February, 1974, the Defendants conducted an administrative investigation into the basis of the charges cited in Paragraph 7 above.

9. On February 25, 1974, the District Director for the Pittsburgh Office of the Defendants requested, by letter, that Horne's provide Defendants with certain business records, documents and detailed answers to interrogatories pertaining to the operations of the Plaintiff's Horne's division. Copies of two of the above charges, not previously served upon Horne's, were enclosed with the letter and interrogatories. This letter, and the interrogatories are annexed hereto and made a part hereof as EXHIBITS A and B, respectively.

10. Upon information and belief, on February 25, 1974, Defendants' District Director mailed a copy of its February 25th letter described above, together with the aforesaid interrogatories and charges, to an attorney who practices law in the City of Pittsburgh, Commonwealth of Pennsylvania.

11. Upon information and belief, the aforesaid attorney represents only one of the charging parties herein. He also represents other persons and associations in the Pittsburgh area, including labor unions. These unions negotiate contracts with Horne's and other employers, of which some of the latter are competitors of Horne's.

12. In March, 1974, the Plaintiff, in response to Defendants' request for cooperation in the investigation of the above-mentioned charges, offered to provide Defendants with witnesses who had first-hand knowledge of the

facts. However, Defendants refused to interview these witnesses until the material described in Paragraph 9 above was supplied.

13. By letter dated April 10, 1974, the Defendants' District Director again requested Plaintiff to provide information and records substantially similar to what was requested in Paragraph 9 above. A copy of this request is annexed hereto and made a part hereof as EXHIBIT C.

14. By letter dated April 18, 1974, Plaintiff's attorney requested Defendants to give written assurances that the information and records sought by the Defendants would not be disclosed to the charging parties, their attorneys or other persons. In addition, Plaintiff's attorney sought to elicit from Defendants information as to specific safeguards which would be provided to prevent the charging parties, their counsel or witnesses, who might be given access to records and information concerning Plaintiff's business, from disclosing this information to others. A copy of this letter is annexed hereto and made a part hereof as EXHIBIT D.

15. By letter dated May 3, 1974, the Defendants advised Plaintiff that they could not make any assurances of non-disclosure, that charging parties and their counsel would be permitted access to the Defendants' investigative files, containing the records, documents, answers to interrogatories supplied by the Plaintiff, and other information obtained during the investigation, and that the Defendants had no way of preventing the disclosure of this information from being transmitted by charging parties to others. A copy of this letter is annexed hereto and made a part hereof as EXHIBIT E.

16. On May 16, 1974, Plaintiff's counsel advised the E.E.O.C. District Director that Plaintiff would not disclose the information requested absent written assurances that said information would not be revealed to the charging parties, their counsel, or witnesses, and absent safeguards by Defendants to prevent the disclosure of the information by such individuals to others. Plaintiff's counsel observed that the Defendants had already unlawfully disclosed official information to Pittsburgh counsel. A copy of this letter is annexed hereto and made a part hereof as Exhibit F.

17. On May 20, 1974, Plaintiff further inquired of Defendants' General Counsel as to Defendants' policy concerning disclosure of E.E.O.C. case files to charging parties, their attorneys or other persons. A copy of this letter is annexed hereto and made a part hereof as EXHIBIT G.

18. By letter dated July 12, 1974, the Defendants' Associate General Counsel replied to Plaintiff's inquiry, stating that "the present E.E.O.C. policy is to disclose, to charging parties and their attorneys, case files . . .which are relevant to the charging party's case. . . ." Defendants' Associate General Counsel further asserted that a charging party or his attorney may also be granted access to "related case files" which included all cases arising from similar allegations of discrimination against the same respondent. A copy of this letter is annexed hereto and made a part hereof as EXHIBIT H.

19. On October 22, 1974, the Defendants' Pittsburgh District Director served upon Plaintiff a subpoena duces tecum, requiring the production of substantially the same records and information as requested in the aforesaid letter of April 10, 1974 in Paragraph 13, above. A copy of this subpoena is annexed hereto and made a part hereof as Exhibit I.

20. On October 23, 1974, the Plaintiff duly petitioned the Defendants to revoke the subpoena issued by its District Director, in accordance with Defendants' regulations, a copy of which is annexed hereto and made a part hereof as EXHIBIT J.

21. In a Determination dated May 9, 1975, Defendants denied the Plaintiff's petition to revoke the District Director's subpoena. This Determination was not received by Plaintiff until June 4, 1975. A copy of the Determination is annexed hereto and made a part hereof as EXHIBIT K.

22. At all times material herein, Plaintiff was willing to make available the documents requested if Defendants assured Plaintiff that it would treat them confidentially.

23. The above-stated policy and practice of Defendants, pursuant to which they authorize, permit or suffer disclosure of Plaintiff's business records and docu-

ments, are in contravention of Acts of Congress, to wit, Sections 706(b) and 709(e) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(b), 8(e), and the Trade Secrets Act, Title 18 U.S.C. § 1905.

AS AND FOR A SECOND SEPARATE AND DISTINCT CAUSE OF ACTION

24. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 23 of this Complaint with the same force and effect as if fully set forth herein.

25. Upon information and belief, Section 1601.20 of the Defendants' regulations, 29 C.F.R. § 1601.20, provides:

> "Neither a charge, nor information obtained pursuant to section 709(a) of Title VII, nor information obtained from records required to be kept or reports required to be filed pursuant to sections 709(c) and (d) of said Title, shall be made matters of public information by the Commission prior to the institution under this title of a court proceeding involving such charge or information. This provision does not apply to such earlier disclosures to the charging party, the respondent, witnesses, and representatives of interested Federal, State and local agencies as may be appropriate or necessary to the carrying out of the Commission's functions under the title, nor to the publication of date derived from such information in a form which does not reveal the identity of the charging party, respondent, or person supplying the information. (As revised October 27, 1971.)"

26. (a) Upon information and belief, on or about February 20, 1975, Defendants adopted and promulgated revised regulations pursuant to § 713(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-12(a) (1972), and the 1974 amendments to the F.O.I.A., contained in 29 C.F.R. §§ 1610.1, *et seq.*, which provide, in part:

> "Special disclosure rules apply to the case files for charging parties, aggrieved persons on whose be-

> half a charge has bee filed, and entities against whom charges have been filed. The special disclosure rules are available in the public reading areas of the Commission. Under sections 706 and 709 [of Title VII] case files involved in the administrative process of the Commission are not available to the public." 29 C.F.R. § 1610.17(d) (40 Fed. Reg. 8171, 8174).

(b) The said "special disclosure rules" were first adopted by the Defendants on May 21, 1975, and are included as Section 83 of the E.E.O.C. Compliance Manual. A copy of such rules are annexed hereto and made a part hereof as EXHIBIT L.

27. The above-quoted regulations of the Defendants, and the "special disclosure rules" contained in Section 83 of Defendants' Compliance Manual confer a substantive benefit upon private parties in agency proceedings and therefore constitute substantive agency rules.

28. Defendants are prohibited from issuing substantive rules pursuant to § 713(a) of Title VII, 42 U.S.C. § 2000e-12(a), as amended.

29. The above-quoted regulations and said "special disclosure rules" have been issued in excess of the Defendants' statutory authority.

30. The above-quoted regulations and said "special disclosure rules" void or invalid, and not binding upon Plaintiff, since they have been issued in excess of Defendants' statutory authority.

AS AND FOR A THIRD CAUSE OF ACTION

31. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 27 of this Complaint with the same force and effect as it fully set forth herein.

32. The Defendants' regulations respecting disclosure to charging parties, their attorneys, and others, are incorporated in the above-described "special disclosure rules."

33. These "special disclosure rules" were not adopted pursuant to the notice requirements and rule-making procedures prescribed by 5 U.S.C. §§ 551(5) and 553.

34. The said "special disclosure rules" are invalid, of no effect, and not binding upon the Plaintiff, since they have not been adopted or promulgated to law, as required by 5 U.S.C. § 553.

35. The refusal of Defendants to assure confidential treatment of the subpoenaed information, and its authorization of disclosure to charging parties and others, in the absence of valid rules protecting the interest of providers of information, constitute an unlawful abuse of agency discretion and are arbitrary and capricious.

AS AND FOR A FOURTH SEPARATE AND DISTINCT CAUSE OF ACTION

36. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 26 of this Complaint, with the same force and effect as if fully set forth herein.

37. The refusal of Defendants to assure the confidential treatment of the subpoenaed records and information described above, and its authorization of disclosure for said documents, constitute an unlawful abuse of agency discretion which is arbitrary and capricious, since said information, is exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b)(3), as "matters that are . . . specifically exempted from disclosure by statute."

AS AND FOR A FIFTH SEPARATE AND DISTINCT CAUSE OF ACTION

38. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 26 of this Complaint, as if fully set forth herein.

39. The refusal of Defendants to assure the confidential treatment of the subpoenaed records and information described above, and its authorization and disclosure for said documents, constitute an unlawful abuse of agency discretion which is arbitrary and capricious, since said information is exempt from disclosure under the Free-

dom of Information Act, 5 U.S.C. § 552(b)(4), as "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

AS AND FOR A SIXTH SEPARATE AND DISTINCT CAUSE OF ACTION

40. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 26 of this Complaint, as if fully set forth herein.

41. The information sought by Defendants, as described in Paragraphs 9, 13 and 19 above, contains personnel and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

42. The refusal of Defendants to assure the confidentiality of the subpoenaed records and information described above, and its authorization of disclosure for said documents, constitute an unlawful abuse of agency discretion which is arbitrary and capricious, since said information is exempted from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b)(6), which exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

AS AND FOR A SEVENTH SEPARATE AND DISTINCT CAUSE OF ACTION

43. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 26 of this Complaint as if fully set forth herein.

44. The refusal of Defendants to assure the confidentiality of the subpoenaed records and information described above and its authorization of disclosure for said documents, constitute an unlawful abuse of agency discretion which is arbitrary and capricious, since said information is exempted from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b)(7), which exempts "investigatory records compiled for law enforcement purposes. . ." as therein provided.

ALLEGATIONS AS TO ALL CAUSES JOINTLY AND SEVERALLY

45. Unless and until such time as Defendants assure Plaintiff that such records and information as Plaintiff provides will not be disclosed to charging parties, their attorneys and others, Plaintiff is unable to cooperate in the Defendants' investigation without seriously and irreparably prejudicing its position. Defendants' failure and refusal to grant confidentiality increases the likelihood of unnecessary litigation, attended by massive publicity adverse to Plaintiff's reputation, good will and competitive position.

46. In the event Plaintiff did provide the information subpoenaed by the Defendants and, consistent with the Defendants' stated intention, the information and records are revealed, the public will be given access to highly confidential business information and personal data which could be utilized by competitors, labor unions, employees and other persons to seriously and irreparably damage Plaintiff's business, and the lives, reputations and privacy of Plaintiff's employees and other persons.

47. The Plaintiff has suffered, and will continue to suffer damages to its business in an amount in excess of $10,000.00 unless Defendants are restrained from disclosing records obtained from the Plaintiff to the charging parties, their attorneys or other members of the public.

48. The Plaintiff, its employees and other persons will suffer irreparable injury for which there is no adequate remedy at law should Defendants be permitted to disclose the subpoenaed records and information. Once such documents are disclosed, the information so released can never be recouped by the Plaintiff, and its confidential nature cannot be restored.

49. Disclosure will adversely affect the good will and reputation of the Plaintiff, seriously damage its competitive position, jeopardize the security and safety of its operations, threaten its labor stability and expose Plaintiff to unwarranted litigation and adverse publicity.

WHEREFORE, Plaintiff prays that this Honorable Court:

1. Order, adjudge and decree that the disclosure rules and policies promulgated by Defendants specifically 29 C.F.R. §§ 1601.20, 1601.17(d) and Section 83 of its Compliance Manual, are null and void, or invalid as applied to the Plaintiff; and that disclosure by Defendant of the subpoenaed records and information, absent assurances of complete confidentiality, constitute an impermissible exercise of Defendants' authority and an unlawful abuse of agency discretion.

2. Permanently enjoin and restrain Defendants, their officers, agents, servants and employees, and all persons acting in concert or cooperation with them, from disclosing to any person or member of the public, including charging parties and their attorneys, any of the records or information provided to them pursuant to Defendants' investigation of the charges described above.

3. Grant Plaintiff reasonable attorney fees and litigation costs incurred in this action, and such other and further relief as appears to this Court to be just and proper.

Respectfully submitted,

JACKSON, LEWIS, SCHNITZLER & KRUPMAN
261 Madison Avenue
New York, N. Y. 10016
(212) 697-8200

By: /s/ Robert Lewis
ROBERT LEWIS
ROGER S. KAPLAN
HUNTON & WILLIAMS
700 East Main Street
P. O. Box 1535
Richmond, Virginia 23212
(804) 649-3661

By: /s/ Eppa Hunton IV
EPPA HUNTON IV
FRANCIS V. LOWDEN, JR.
HILL B. WELLFORD, JR.
Attorneys for Plaintiff

Dated: July 28, 1976.

EXHIBIT "A"

[*Seal*]

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Pittsburgh District Office
1000 Liberty Avenue
Room 2038A
Pittsburgh, Pennsylvania 15222

February 25, 1974

In reply refer to:
Charge Numbers
TP12-0454
TP13-0836
TP13-0774
TP12-0324
TP12-0323
TP12-0484
TP12-0562

Personnel Manager
Joseph Horne Company
501 Penn Avenue
Pittsburgh, PA 15222

Dear Sir:

Upon completion of an inventory of charges of discrimination against the Joseph Horne Company, we found that the above-referenced charges remained outstanding. As you know, the Commission is authorized to conduct comprehensive investigations of the above-referenced charges under the provisions of Title VII of the Civil Rights Act of 1964. Accordingly, in order that the Commission may determine all relevant facts we are requesting that you forward us copies of required records and documents and detailed answers to questions contained in the enclosed interrogatory.

Also, enclosed herewith are copies of charges not previously served to the Joseph Horne Company. Upon receipt of the enclosed you are required to sign the original Receipt for Service and return them to this office in the enclosed self-addressed envelope.

In addition to the information and documents required by the interrogatory, you may, should you wish, submit written statements of your position and evidence you deem relevant to a determination of the charge.

Upon receipt of your reply to the interrogatory, we will review the materials and ascertain whether additional information is needed. In which event, we will contact you.

Your response to the enclosed interrogatory, along with the requested records and statements, are to be received in this office within 14 days from receipt of this letter.

We look forward to your prompt response and full cooperation. Should you have any questions, please contact me at 644-3444.

Sincerely,

/s/ Rita M. Smith
RITA M. SMITH
Equal Opportunity Specialist

cc: Louis B. Kushner
Rothman, Gordon, Foreman and Groudine
300 Grant Building
Pittsburgh, Pennsylvania 15219

EXHIBIT "B"

INTERROGATORY

1. Promotional roster for Protection Department including clericals, since 1970 to present. Indicate employee's name, race, sex, job promoted from and salary; job promoted to, salary and date. (Also indicate store each employee is assigned).
2. Employment applications of persons having been hired into the Protection Department since 1969.
3. Submit employment applications of persons applying for security positions and who have not been employed.
4. Attach an employee roster of entire Protection Department since 1969 to present. Include the employee's name, race, sex, date employed, present salary, present job title, and store assigned.
5. Describe training programs for security force in detail and indicate by name which employees were trained under what training program.
6. Submit copies of all employee injury reports for year 1969. Indicate the name, race, sex, and job title for each. Also, describe compensation, benefits and services afforded each person; salaries paid each employee before injury and salary paid each employee following his or her injury.
7. Describe in detail the procedure in apprehending a theft suspect and submit evidence of each apprehension having occurred for years 1971 and 1972.
8. Submit appraisal ratings for store detectives for the year 1971.
9. Describe and/or submit Respondent's wage policy for protective personnel.
10. Describe and submit records, giving indications of qualifications for each job title in the Protection Department.

11. Attach employee records for the following persons:

    Katherine Murray
    Marsue Dingley
    Alice Corvino
    Herman Hartman
    Ken McCarty
    George Fields

12. Submit a listing of disciplinary actions having been taken against employees in the Protection Department since 1971 until present. Include the employee's name, the action and dates involved, and reason for taking such action.

13. Include personnel records of supervisory personnel in the Protection Department including employment applications, qualifications for assuming the position and pay records for first six months while occupying a supervisory position.

14. List the number of stores Respondent has in Western Pennsylvania.

15. Attach an employee roster for each store having a tea room and food services for each store—indicate store location, employee's name, race, sex, date of hire, present job title, present salary, and indicate whether employee is full time or part time.

16. Submit job descriptions for supervisory personnel, salad personnel, relief personnel and qualifications for each.

17. Attach a promotional roster for all food service personnel—include employee's name, race, sex, job promoted from and salary, and job promoted to, salary and date.

18. Include applications for employment of all food service personnel employed during the year 1970.

19. List all food service personnel terminated since 1969 to the present, include employee's name, race, sex, date of hire, job title, date terminated and reason for termination.

20. Submit a separate roster for each store of supervisory personnel, assistant supervisory personnel, and/or department heads—employee's name, race, sex, date of hire, position title, department assigned, salary, date assumed position, and number of employees under, include their race and sex.

21. Attach copies of personnel and/or employment records for Charging Party Katherine Murray.

22. Promotional roster of all stores since January 1970 to December 1973 of sales personnel, section managers, staff assistants and/or assistant buyers and buyers. Include the employee's name, race, sex, job promoted from, salary department and store; job promoted to, salary, department and store, salary and date.

23. Roster of trainees in the Executive Training Program and—those in the Junior Executive Training Program. Roster to include—employee's name, race, sex, dates in program, indicating which program; salary paid while in the program, and job title upon completion of the program, department, store assigned and salary after completion of the program.

24. Listing of persons transferred in 1972 showing employee's name, sex, race, store transferred from, job title and salary; store transferred to, job title, salary and date transferred.

EXHIBIT "C"

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Pittsburgh District Office
1000 Liberty Avenue
Room 2038
Pittsburgh, Pennsylvania 15222

April 10, 1974

In reply refer to:
Charge Nos. TP12-0454
TP13-0774
TP12-0484
TP12-0562
TP12-0323
TP12-0324
TP13-0836

Mr. Robert Lewis
261 Madison Avenue
New York, New York 10016

Dear Mr. Lewis:

We are currently attempting to conduct a thorough investigation of the above referenced charges. In the conduct of any investigation of alleged discrimination we must obtain relevant information of a comparative nature and verification of specific items. Obviously we must review records pertaining to the Charging Party and other similarly situated individuals in order to make a comparison of treatment. The records we review need to cover a certain time span within which the alleged discrimination occurred. This time span must be sufficiently broad to enable us to make appropriate comparisons.

Again we ask you to make available to our investigators the records that will allow us to make the proper determinations of the charges.

The following is a list of records we need to review to make a determination of the charges:

TP12-0454—Murray—promotions, wages

1. Employment application of Charging Party Murray and others employed as food service employees at the downtown store for the periods 1970 and 1971.
2. Individual pay period payroll records for above persons for years 1970 and 1971.
3. Personnel action records indicating promotions, dismissals and terminations for the above.

TP13-0774—Carwno—promotions, wages

1. Employment applications of staff assistants and assistant buyers employed at the downtown store for 1972 and 1973.
2. Individual payroll records, by pay periods, for above persons.
3. Employment application for Ken McCarty; his pay records for year 1972. This employee may have been employed at the South Hill store.
4. Employment application for George Fields; personnel action records indicating any promotions and his pay records for years 1971 and 1972 and 1973.
5. Appraisal ratings records for all staff assistants and assistant buyers at all stores for 1970, 1971 and 1973.
6. If salary increases are not indicated on the above, item #5, please include payroll records for the above.

TP12-0484—Kritko

1. On-the-job injury report records during the year 1972.
2. Records indicating employer compensation for the above.

TP12-0562—Denk

1. Job description for clerical personnel in the Protection Office.

2. Qualifications for store detectives.

3. Copy of training requisites for store detective.

4. Copies of personnel actions indicating promotions for clerical personnel in the Protection Office for 1971, 1972 and 1973.

5. Employee applications for Marlene Denk and those above.

TP12-0323—Pollock

Already covered in records requested for others.

TP12-0324—Blake

1. Personnel actions indicating persons terminated from Protection Department since 1971 to present; if the reason for termination is not indicated on this record, please provide record that does so indicate.

2. Copies of arrest records made in 1971 and 1972 by Protection Department personnel that indicate the arresting personnel and the disposition of the arrest.

TP13-0836—Dingley

1. Employment applications of supervisory personnel in the Security Department of the main store (1971, 1972 and 1973).

2. Personnel action records showing promotions for the above (1971, 1972 and 1973).

3. Records of disciplinary action taken against all employees in 1973.

4. Job descriptions for store detectives of that above the classification of store detective.

5. Employment applications for persons of above, and personnel actions indicating dates these persons occupied the above positions and their salaries (1971, 1972 and 1973).

6. Pay records for store detectives, persons directly above the classification of store detectives and those of supervisory personnel.

Please notify us promptly of your decision regarding this request. If we are not permitted access to the information, we will have no other choice but to issue a subpoena, forthwith.

Thank you for your cooperation in this matter.

Yours truly,

/s/ Eugene V. Nelson
EUGENE V. NELSON
District Director

EXHIBIT "D"

April 18, 1974

Mr. Eugene V. Nelson
District Director
Equal Employment Opportunity Commission
Pittsburgh District Office
1000 Liberty Avenue
Room 2038
Pittsburgh, Pa. 15222

Re: Charge Nos. TP12-0454 TP12-0323
TP13-0774 TP12-0324
TP12-0484 TP13-0836
TP12-0562

Dear Mr. Nelson:

This is in reply to your letter of April 10 addressed to me as counsel for Joseph Horne Co.

Prior to making relevant information available to you, we would like written assurances that the information contained in the records you seek will not be disclosed to the charging parties, their counsel, or persons whom you interview during your investigation. Moreover, in the event you are unable to give us satisfactory assurances, we would like to be advised concerning the safeguards you provide which will preclude said persons from in turn transmitting this information to others.

In this connection, we have repeatedly asked your investigator to identify Louis B. Kushner and the reason why he was furnishing a copy of the Commission's letter dated February 25, 1974, and its enclosures, addressed to the Personnel Manager of the Company.

Very truly yours,

JACKSON, LEWIS, SCHNITZLER
& KRUPMAN

RL/mtd

Robert Lewis

EXHIBIT "E"

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Pittsburgh District Office
1000 Liberty Avenue
Room 2038
Pittsburgh, Pennsylvania 15222

May 3, 1974

In reply refer to:
Charge Nos. TP12-0454
TP13-0774
TP12-0484
TP12-0562
TP12-0323
TP12-0324
TP13-0836

Robert Lewis, Esquire
261 Madison Avenue
New York, New York 10016

Dear Mr. Lewis:

This is in reply to your letter of April 18, 1974 regarding relevant information we need to conduct a thorough investigation of the above referenced charges.

You stated you would like to have written assurances that the information contained in the records will not be disclosed to Charging Parties, their counsel, or persons we interview during the investigation.

Our procedure is to obtain all of the relevant facts related to the allegations. In analyzing and interpreting the data we may find it necessary to discuss with the Charging Party certain information for clarification. We do not make a full disclosure of information in the records. Should the Charging Parties and their counsel contemplate suit, they must be permitted access to the case file which will contain the relevant records. Likewise,

Respondent attorneys have access to the file if suit is contemplated. We have no way of preventing Charging Parties from transmitting information they have. We can only advise them not to do so. We try to make all of our efforts in investigation and conciliation completely confidential so that Charging Parties, Respondents and our staff are the only people knowledgeable about the case.

You also wanted to know about Louis B. Kushner who received copy of correspondence sent to the Personnel Manager of the company. Mr. Kushner is counsel for two Charging Parties.

Through our error a carbon copy of the letter was sent to Mr. Kushner. However, this error did not result in the disclosure of any information in the company's records. Please be assured that the information we request will be used to make an accurate determination of the charges under investigation.

Yours truly,

/s/ Eugene V. Nelson
EUGENE V. NELSON
District Director

EXHIBIT "F"

May 16, 1974

Mr. Eugene V. Nelson
District Director
Equal Employment Opportunity Commission
Pittsburgh District Office
1000 Liberty Avenue
Room 2038
Pittsburgh, Pennsylvania 15222

Re: Joseph Horne Company
Charge Nos. TP12-0454
TP13-0774 TP12-0323
TP12-0484 TP12-0324
TP12-0562 TP13-0836

Dear Mr. Nelson:

This is in response to your letters of April 10 and May 3, which have been given our most serious consideration.

In my letter of April 18, 1974, I asked for "written assurances that the information contained in the records you seek will not be disclosed to the charging parties, their counsel, or persons whom you interview during your investigation."

In your reply of May 3, 1974, you fail to provide these assurances. On the contrary, your Rules and Regulations (Sec. 1601.20) expressly permit such disclosures during the investigation. This section states in part, "This provision (prohibiting disclosure by the Commission prior to the institution of Court proceedings) does not apply to such earlier disclosures as the charging party (or) witnesses . . . ." It is precisely such "early disclosure" during the current investigation that is our concern at this juncture.

In my letter, I also inquired concerning safeguards the Commission provides to preclude the charging party, their counsel, and persons interviewed, in the event of disclosure to them, from transmitting this information to others. You replied that the Commission had no way to prevent the transmitting of this information.

Under these circumstances, we are not furnishing the materials you requested. Our client is apprehensive that to provide this information could allow third parties, such as competitors and labor unions, to use it to its detriment, or subject it to potential lawsuits by other third parties. Furthermore, public disclosure of security apprehensions by protection department personnel might subject our client to further lawsuits and possible criminal prosecution.

That the disclosure of confidential information by your Agency is not speculative is evidenced by our experience in this case to date. In your letter of May 3, you acknowledge that your office erroneously transmitted to Louis B. Kushner, a copy of your letter dated February 25, 1974, addressed to our client. The February 25th letter related to the completion by the Commission of an "inventory of charges of discrimination against the Joseph Horne Company." Enclosed with the letter was a set of 24 interrogatories and copies of two charges. You acknowledge that Mr. Kushner should not have received this information. We agree, but are alarmed at this disclosure. To make public the nature and scope of the Commission's investigation and the identity of charging parties is a serious statutory violation.

If, notwithstanding the above infraction, you can now assure us in writing that information which we may supply will be treated confidentially and not disclosed to witnesses you interview, charging parties, or their counsel, we will provide you with that which is deemed relevant.

We appreciate your need to inquire into such matters and have cooperated with your office in the investigations of these and other charges, and will continue to do so.

If we can be of further assistance, please contact me.

Very truly yours,

JACKSON, LEWIS, SCHNITZLER
& KRUPMAN

RL:YM

Robert Lewis

EXHIBIT "G"

May 20, 1974

William A. Carrey, Esq.
General Counsel
Equal Employment Opportunity Commission
1800 G Street N.W.
Washington, D.C. 20506

Dear Sir:

Would you please inform me whether the Opinions of General Counsel and attached Commission memorandum are presently in effect. In the event they are not, would you please advise me whether they have been replaced by opinion or memorandum of similar import.

In the event the Commission memorandum dated September 15, 1970 is still in effect, would you please send me the full text of this memorandum. In the event that it has been replaced, would you please send me the full text of any current General Counsel Opinion or memorandum covering this subject.

Very truly yours,

JACKSON, LEWIS, SCHNITZLER
& KRUPMAN

Robert Lewis

RL:AIW
Enclosure

Opinion of General Counsel, September 13, 1965

"If an attorney appears on behalf of a complainant, he is entitled to information as to the status of the charge and, thereafter, to receipt of relevant correspondence or other communications relating to his client. The prohibitions against 'public' disclosure set forth in Sections 706(a) and 709(e) do not apply to a complainant's attorney."

Opinions of General Counsel, November 9, 1965 and November 12, 1965

"The investigator's report in a case may be examined by counsel for the charging party after expiration of the statutory period for investigation and conciliation to determine whether or not, in counsel's opinion, the facts justify the commencement of a civil action pursuant to section 706(e) and, if so, to obtain information relevant to drafting the complaint. Before a report is made available, counsel must agree that it will not be used for any other purpose and that the information contained therein will not be disclosed except to the extent necessitated by filing the complaint. After a civil action has been initiated, the investigator's report may be examined by counsel for the respondent for the purpose of preparing a defense. While copies of the inevstigator's report will not be furnished to counsel for the charging party and the respondent, such reports may be examined at the offices of the Commission. When access to an investigator's report is sought by counsel for the charging party or respondent, a member of the staff of the General Counsel or the Office of Compliance will first examine the report and delete or withhold any information in the following categories: (1) observations, remarks, or references which are personal to the investigator and do not constitute factual information developed during the investigation; (2) the names of witnesses who have expressed a desire to remain anonymous or have given information on a confidential basis; (3) statements, occurrences, or events which are essentially conciliatory in nature. Investigators' reports will be made available to counsel

under the foregoing conditions to the extent that limitations of time and staff permit."

Commission Memorandum Dated September 15, 1970

"The investigator's report in a case may be examined by counsel for the charging party after expiration of the statutory period for investigation and conciliation (60 days from the date of filing with the Commission) to determine whether or not, in counsel's opinion, the facts justify the commencement of a civil action pursuant to Section 706(e) and, if so, to obtain information relevant to drafting the complaint. Before a report is made available, counsel must agree that it will not be used for any other purpose and that the information contained therein will not be disclosed except to the extent necessitated by filing the complaint."

EXHIBIT "H"

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Washington, D.C. 20506
July 12, 1974

Jackson, Lewis, Schnitzler & Krupman
Attorneys at Law
261 Madison Avenue
New York, New York 10016
Attention: Robert Lewis, Esquire

Dear Mr. Lewis,

I am in receipt of your May 20, 1974 letter in which you requested information regarding the Commission's Interpretations and Opinions, specifically opinions regarding disclosure of EEOC case files to attorneys for charging parties. In December, 1970, the Commission clarified certain misinterpretations about these opinions, which opinions were discontinued after July 1, 1966. (See attached notice.) As the notice indicates those opinions did not affect any persons other than the specific addressee(s).

The present EEOC policy is to disclose, to charging parties and their attorneys, case files, including EEO-1 reports, which are relevant to the charging party's case and which are to be used in connection with contemplated or pending litigation.

In addition, a charging party or his attorney may be granted access to related case files involving a respondent against whom the charging party is contemplating litigation or has litigation pending. Such related case files should include only those files involving charges against the same respondent where the charge involves a charge of discrimination on the same base or bases as alleged by the charging party requesting access to the files. In other words, charges alleging completely dif-

ferent bases from that alleged by the requesting charging party are not related, and the files in those cases should not be disclosed to the charging party or CP's attorney.

If I can be of further help in this matter, please contact me immediately.

Sincerely,

WILLIAM A. CAREY
General Counsel

/s/ Issie L. Jenkins
ISSIE L. JENKINS
Associate General Counsel
Legal Counsel Division

FEDERAL REGISTER
Volume 35, DECEMBER 9, 1970
Page 18692

Notices

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

INTERPRETATIONS AND OPINIONS OF THE COMMISSION

The Equal Employment Opportunity Commission (hereinafter referred to as the Commission), in order to dispel an apparent misunderstanding, on the part of a number of respondents, with respect to the materials constituting a "written interpretation or opinion of the Commission" within the meaning of section 713(b) of the Civil Rights Act of 1964, 42 U.S.C. section 2000e-12 (b), invites specific attention to the provisions of § 1601. 30 of the Commission's Procedural Regulations, 29 CFR 1601.30. The provision referrred to has, since July 1, 1965, specifically restricted the meaning of the phrase "written interpretation or opinion of the Commission" to correspondence entitled "opinion letter" and signed by the General Counsel on behalf of the Commission (29 CFR 1601.30(a)). Matter issued pursuant to 29 CFR 1601.30(a) is issued to a specific addressee(s) and has no effect upon situations other than that of the specific addressee(s).

Accordingly, matter appearing in the Quarterly and Annual Digests of Legal Interpretations, formerly issued by the Office of the General Counsel and discontinued subsequent to July 1, 1966, neither met nor were intended to meet the standards required of a "written interpretation or opinion of the Commission" within the meaning of the Commission's procedural regulations, 29 CFR 1601.28-1601.30, or section 713(b), 42 U.S.C. section 2000e-12(b). Similarly, matter appearing in the commercial reporting services erroneously entitled, "opinion letter" or "General Counsel Opinion" do not meet the standard required of a "written interpretation or opin-

ion of the Commission" within the meaning of the Commission's procedural regulations, 29 CFR 1601.28-1601.30, or section 713(b), 42 U.S.C. section 2000e-12(b).

This notice shall be effective upon publication in the FEDERAL REGISTER.

Signed at Washington, D.C., this 1st day of December 1970.

WILLIAM H. BROWN III,
Chairman.

[F.R. Doc. 70-16503; Filed, Dec. 8, 1970; 8:46 a.m.]

EXHIBIT "I"

UNITED STATES OF AMERICA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
DISTRICT OFFICE

SUBPOENA AD TESTIFICANDUM/DUCES TECUM
No. PI-006

CHARGE NO. TPI2-0454 et al.,
see page 2

In the matter of Katherine Murray et. al., (see page 2) vs. Joseph Horne Company.

To: James Downing, Personnel Director
(Name)

Joseph Horne Co., 4th Floor, 501 Penn Ave., Pittsburgh, PA 15222
(Address)

Request therefore having been made by the undersigned District Director YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE Rita Smith, Equal Employment Specialist of the Equal Employment Opportunity Commission at 2038A Federal Building in the City of Pittsburgh on October 30 at 10 o'clock a.m. of that day, to [ ] Testify [xx] Produce and bring with you at said time and place the following documents The documents are described on the attached 4 pages, on each of which the District Director's signature appears.

Pursuant to Section 1601.15, EEOC Procedural Regulations, 29 C.F.R. Section 1601.15, if the addressee intends not to comply with this subpoena, he must, within 5 days after the date of service (excluding Saturdays, Sundays and legal holidays) petition by mail, the Director of Compliance, 1800 G Street, N.W., Washington, D.C. 20506 (also serving a copy upon the District Director named below) to revoke or modify the subpoena. The

District Director will grant no extensions of time except in extraordinary circumstances. It is advisable that the addressee include a Certificate of Service as to the date on which the petition is mailed. The petition shall state each ground upon which it relies.

DATE

October 18, 1974

DISTRICT/DEPUTY DIRECTOR *(Typed name)*

EUGENE V. NELSON

FOR THE COMMISSION *(Signature)*

/s/ Eugene V. Nelson

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena, if any, shall be paid by Commission where the witness submits this subpoena with the voucher when claiming reimbursement to said District Office.

Attachment to Subpoena No. PI-006, dated October 18, 1974 in the following charges:

TPI2-0454	Katherine Murray v. Hornes
TPI3-0774	Alice M. Corvino v. Hornes
TPI2-0562	Marlene Denk v. Hornes
TPI2-0324	Lois Blake v. Hornes
TPI2-0323	Helen O. Pollock v. Hornes
TPI2-0484	Mary Kritko v. Hornes
TPI3-0836	Marsue Dingley v. Hornes

1. TPI2-0454—Murray

    1. Employment application of Charging Party Katherine Murray.

    2. Employment applications of all Food Service employees at downtown Pittsburgh store, 1970 and 1971, designated by race.

    3. Individual pay period payroll records for Katherine Murray and all other Food Service employees at downtown stores, 1970 and 1971, designated by race.

    4. Personnel action records indicating promotions and discharge for above persons.

2. TPI3-0774—Corvino

    5. Employment application of staff assistants, buyers and assistant buyers employed at downtown store, 1972 and 1973.

    6. Individual payroll records, by pay periods, of those employees described in Item No. 5 for the years 1972 and 1973.

    7. Employment application and 1972 pay records for Mr. Ken McCarty, formerly a buyer in the Luggage Department, South Hills Store.

    8. Employment application of George Fields, downtown store; personnel action records indicating his promotions for the years 1971, 1972 and 1973.

    9. Evaluation and ratings records for all staff assistants and assistant buyers at all stores located

in Allegheny County for the years 1970, 1971, 1972 and 1973.

10. Produce payroll records for the above employees described in Item No. 5 for the years 1970 and 1971.

11. Produce roster of promotions for the positions of staff assistants, assistant buyers and buyers at the downtown store for the year 1972; designate by name and sex.

12. Produce list of trainees in the Executive Training Program for the year 1973; designate by sex and salary.

3. TPI2-0362—Denk

13. Produce job description, if extant, for position/s of clerical personnel in the Security Protection Department.

14. Produce personnel manual and/or other written documents indicating job qualifications for the position of store detective.

15. Produce written training requisites for the position of store detective, if extant.

16. Copies of personnel records indicating promotions of clerical personnel in the Security Protection Department, Downtown Store, for 1971, 1972 and 1973; identify by sex.

17. Employee applications for Marlene Denk and all other clerical personnel in the Security Protection Department for 1971, 1972 and 1973.

TPI2-0324—Blake

18. Personnel action records indicating persons discharged from the Security Protection Department, Downtown Store, 1971 through 1973.

19. Copies of arrest records made in 1971 and 1972 by Security Protection Department personnel that indicate the arresting personnel and the disposition of each arrest.

TPI2-0323—Pollock

TPI2-0484—Kritko

TPI2-0324—Blake

20. Payroll records for all personnel in the Security Protection Department, Downtown Store, for the years 1971, 1972 and 1973.

TPI3-0836—Dingley

21. Employment applications of supervisory personnel in the Security Protection Department of the Downtown Store for the years 1971, 1972 and 1973.

22. Personnel action records showing promotions into supervisory positions in the Security Protection Department, Downtown Store, for the years 1971, 1972 and 1973.

23. Records of all disciplinary action taken against all employees in the Security Protection Department of the Downtown Store in the year 1973.

24. Job description for the position of store detective, supervisory and non-supervisory positions.

25. If the records do not exist in the form requested in Items numbered two, three, eleven, twelve and sixteen above, production of the relevant information requested in such other form as most substantially provides the Commission with the requested information or, in the alternative, access to any records of Respondent which contain evidence described in the items enumerated above but in a form different from that specifically described in these items, will be accepted as compliance.

FOR THE COMMISSION (Signature)

/s/ Eugene V. Nelson

DATE

October 18, 1974

DISTRICT DIRECTOR (Typed name)

EUGENE V. NELSON

EXHIBIT "J"

452079
Certified Mail 452080
Return Receipt Requested

October 23, 1974

Director of Compliance
Equal Employment Opportunity Commission
1800 G Street, N. W.
Washington, D.C. 20506

Re: Katherine Murray et. al. and
Joseph Horne Company
Charge Nos. TPI 2-0454, TPI 3-0774,
TPI 2-0323, TPI 2-0562, TPI 2-0484,
TPI 2-0324, TPI 3-0836
Subpoena No. PI-006

Dear Sir:

Enclosed please find the original and one copy of the Employer's Petition To Revoke Subpoena issued by the District Director of the Pittsburgh District Office on October 18, 1974 and served upon the Employer on October 22, 1974 by mail. A copy of this Petition has been mailed to Eugene V. Nelson, District Director of the Pittsburgh District Office.

Very truly yours,

JACKSON, LEWIS, SCHNITZLER & KRUPMAN

ROBERT LEWIS

RL:YM
ENC.
CC: Eugene V. Nelson

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

Charge Nos. TPI 2-0454
TPI 3-0774
TPI 2-0562
TPI 2-0324
TPI 2-0323
TPI 2-0484
TPI 3-0836

IN THE MATTER OF:

KATHERINE MURRAY ET AL.,
CHARGING PARTIES

—and—

JOSEPH HORNE COMPANY, EMPLOYER

To: Director of Compliance
1800 G Street, N. W.
Washington, D. C.

PETITION OF *EMPLOYER*
TO REVOKE SUBPOENA NO. PI-006

On October 22, 1974, the Employer was served with Subpoena No. PI-006, a copy of which is attached hereto, calling for the production of records and documents under twenty-five (25) separate headings, such production to occur in the office of Rita Smith, Equal Employment Specialist of the Pittsburgh District Office of the Equal Employment Opportunity Commission at 2038A Federal Building, Pittsburgh, Pennsylvania 15222 on October 30, 1974 at 10:00 o'clock A.M. The Employer, by its attorneys, hereby petitions the Director of Compliance to revoke said subpoena.

This petition is based on the following grounds:

1. That the charges cited above, and the nature of information sought in investigation thereof, have been made public by the Commission in violation of Section 706(b) and 709(e) of the Act, and Section 1601.20 of the Commission's Rules and Regulations, 29 C.F.R. 1601.20.

2. That to provide access to the documents requested by said subpoena could permit third parties, such as competitors and labor unions, to use same to the Employer's detriment.

3. That to provide access to certain of the documents requested by said subpoena could subject the Employer to civil legal proceedings or criminal prosecution.

4. That evidence sought by the subpoena does not relate to any matter in question in this proceeding and is not germane to any lawful subject of inquiry.

a. The instant subpoena would require the Employer to provide for the Commission documentary evidence concerning the race of its employees, although six of the seven complaints herein allege discrimination as based solely on sex.

b. The instant subpoena would require the Employer to provide for the Commission documentary evidence concerning the employees, and its personnel practices and procedures, at all of its facilities, although the complaints herein allege discrimination at only two such facilities.

c. The instant subpoena would require the Employer to provide for the Commission documentary evidence concerning the procedure for promotion and the candidates considered for numerous positions for which the charging parties were not and could not have been considered, because of factors wholly unrelated to their sex.

5. That the subpoena would require the Employer to compile information and documentary material not now extant and not normally required under traditional standards of discovery.

6. That the evidence sought by the subpoena is not described with sufficient particularlity.

7. That the documents called for by said subpoena number in the hundreds and it would be oppressive and unreasonable to require the Employer to produce said documents.

8. That said subpoena calls for the production of records relating to a time not pertinent, relevant or admissible to any matter in question in this proceeding.

9. That witness or mileage fees have not yet been tendered to the Employer as is required by law.

WHEREFORE, the Employer respectfully requests that Subpoena PI-006, issued by the District Director of the Pittsburgh District Office on October 18, 1974, be revoked, vacated and set aside.

/s/ Robert Lewis
ROBERT LEWIS
JACKSON, LEWIS, SCHNITZLER & KRUPMAN
Attorneys for Employer
261 Madison Avenue
New York, New York 10016

Dated: New York, New York
October 23, 1974.

CERTIFICATE OF SERVICE

I certify that the foregoing Petition to Revoke Subpoena was duly served on Mr. Edward Pena, the Director of Compliance, Equal Employment Opportunity Commission, on October 23, 1974, by depositing a copy of the same in the United States Mail, securely sealed in an envelope with postage fully prepaid, addressed to him at the following address: 1800 G Street, N. W., Washington, D. C. 20506; and

I certify that the foregoing Petition to Revoke Subpoena was duly served on Eugene V. Nelson, District Director, Equal Employment Opportunity Commission, on October 23, 1974, by depositing a copy of the same in the United States Mail, securely sealed in an envelope, with postage fully prepaid, addressed to him at the following address:

Eugene V. Nelson
District Director
Pittsburgh District Office
Equal Employment Opportunity Commission
2038A Federal Building
Pittsburgh, Pennsylvania 15222

Dated: New York, New York
October 23, 1974

/s/ Peggy L. Braden
PEGGY L. BRADEN

EXHIBIT "K"

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Washington, D.C. 20506

IN THE MATTER OF:

Katherine Murray et al. Charging Parties	Charge Nos. TPI 2-0454 TPI 3-0774 TPI 2-0562 TPI 2-0324 TPI 2-0323 TPI 2-0484
v.	
Joseph Horne Company Respondent-Petitioner	

Subpoena No. PI-006

Addressee: James Downing,
Personnel Director

DETERMINATION ON PETITION TO REVOKE
AND/OR MODIFY SUBPOENA

Respondent-Petitioner having been served with a subpoena duces tecum issued by the District Director pursuant to Section 710 of the Civil Rights Act, as amended, has timely filed a petition to revoke or modify the subpoena. The requisite number of Commissioners having reviewed the petition pursuant to Section 1601.15(b) of the Commission's Procedural Regulations, and having decided that the petition is without merit, the Commission hereby denies the petition for the reasons stated below.

Respondent-Petitioner raises several objections to the subpoena based on its belief that the "the charges . . . and the nature of information sought in investigation thereof . . . have been made public by the Commission in violation of Section 706(b) and 709(e) of the Act, and Section 1601.20 of the Commission's Rules and Regulations . . . ." However, the record indicates that no information regarding these charges has been transmitted to the public

in violation of the sections of the statute and the Commission's Procedural Regulations cited above. Respondent-Petitioner is apparently referring to the fact that certain information regarding one of the charges was sent to that Charging Party's attorney. However, under no circumstances can a Charging Party or his or her attorney be considered to come within the statute's proscription against making a charge public. The section of the Procedural Regulations cited by Respondent-Petitioner in support of its argument specifically excepts Charging Parties from the confidentiality section of the statute. The regulation provides in pertinent part:

> Neither a charge, nor information obtained pursuant to Section 709(a) of Title VII, shall be made matters of public information by the Commission prior to the institution of any proceedings under this Title involving such charge or information. This provision does not apply to such earlier disclosures to the charging party, the respondent, witnesses, and representatives of interested Federal, State and local agencies as may be appropriate or necessary to the carrying out of the Commission's functions under the Title . . . 29 CFR 1601.20.

Because of the privilege existing between an attorney and his or her client, we conclude that any disclosure to a Charging Party's attorney is also permissible.

As part of this same argument Respondent-Petitioner also claims that by providing Charging Parties with access to the documents requested by the subpoena, certain third parties, such as competitors and labor unions, could use the information obtained to Respondent-Petitioner's detriment or could involve Respondent-Petitioner in civil or criminal legal proceedings. We do not see how providing certain information to a Charging Party and her attorney could lead to the result anticipated by Respondent since by doing so the Commission is in no way making any information public. Of course, if the Commission reaches a determination as to reasonable cause on this case and conciliation attempts fail, then either the Com-

mission or the Charging Parties may seek recourse in the courts. But this possibility existed the moment the Charging Parties filed their charges and Respondent may not request revocation of this subpoena on the ground that information requested by it may ultimately require Respondent to defend its employment practices in court. We conclude that Respondent-Petitioner's arguments concerning disclosure was without merit.

Respondent-Petitioner's second major contention is that the "evidence sought by the subpoena does not relate to any matter in question in this proceeding and is not germane to any lawful subject of inquiry." More specifically Respondent-Petitioner objects to the fact that the subpoena requires it to provide evidence concerning the race of its employees although only one of the seven Charging Parties alleges that she was discriminated against because of her race. We find this argument to be unpersuasive. While six of the seven complaints allege discrimination on the basis of sex, one does allege discrimination on the basis of race. All of the charges, including the one involving race discrimination, are broad-based class charges and therefore necessarily call for an investigation that goes beyond the employment record of the individual Charging Party. In connection with the race discrimination charge, the subpoena merely seeks information concerning persons similarly situated to Charging Party, that is, information concerning other employees in the Charging Party's department at the store in which she worked. The employees are to be designated by race only. Obviously the Commission's investigator is seeking comparative information relating to Respondent's treatment of Blacks generally and Charging Party in particular as compared to treatment of similarly situated white employees in the same department. It is well settled that comparative data of this kind is probative of issues raised in employment discrimination cases. *McDonnell-Douglas Corp* v. *Green*, 411 U.S. 792 (1973); *Georgia Power Co.* v. *EEOC*, 412 F.2d 421 (5th Cir. 1969); *EEOC* v. *University of New Mexico*, —— F. Supp. ——, 7 EPD para. 9118 (D. N.M. 1973).

Continuing with this same line of argument, Respondent-Petitioner also claims that it would have to provide information concerning all of its facilities although the charges allege discrimination at only two such facilities. While one item in the subpoena does request certain personnel records from each of Respondent's Alleghany County stores, all the other items seek information regarding employees and employment practices at Respondent's downtown store only. The single item in question seeks information pertaining to a Charging Party who was employed in several of Respondent-Petitioner's stores. Her charge alleges that she was not promoted because of her sex. She was employed as a staff assistant and, apparently, the next position in her line of progression is that of assistant buyer and then buyer. Because there are only a few assistant buyers and buyers in any given store, the need to obtain a sufficient sample on which to base a comparative study requires that information regarding these positions be obtained from more than one or two facilities. Thus we are not persuaded that modification of this part of the subpoena is called for.

Related also to the claim that the evidence sought by the subpoena is not "germane" to the charges is Respondent-Petitioner's contention that the information requested concerns procedures for promotions and candidates considered for numerous positions for which the Charging Parties were not and could not have been considered, because of factors wholly unrelated to their sex. We do not agree. Most of the Charging Parties were or are in Respondent-Petitioner's Security Department. With respect to those Charging Parties the subpoena requests job descriptions of various Security Department positions, personnel actions on employees in the Department, including promotions and discharges, and the like. Because Charging Parties allege that they have been denied promotions in this Department because of their sex, this kind of evidence is highly relevant. It may be that one or more of the Charging Parties did not possess the qualifications for promotion, but that fact cannot be established without evidence showing what qualifications were necessary for the position or promotion in question and whether Charging Parties were not as well qualified

as those individuals who did receive promotions. Respondent-Petitioner's bald assertion that they were not qualified will not suffice. Furthermore, it is not for Respondent to determine what documents may or may not be relevant to an investigation of a charge of employment discrimination against it. *EEOC* v. *University of New Mexico*, 7 EPD para. 9118 (D. N.M. 1973).

Respondent-Petitioner also claims that the subpoena would require it to compile information and documentary material not now extant and not formally required under traditional standards of discovery. If the information requested does not exist in any form then obviously Respondent-Petitioner cannot be required to produce it. However, we do not believe that is the situation in this case. Rather, Respondent-Petitioner appears to be claiming that it cannot be required to compile the information requested into list form from a variety of different sources. However, the subpoena does not require Respondent-Petitioner to undertake any such effort. Most of the items in the subpoena seek employment applications, evaluations, payroll records, job descriptions, personnel manuals and the like—discrete documents which exist in the form requested and which require nothing more than that they be turned over in that form to the Commission's representative. To the extent that certain of the documents or records requested *may* not exist in the form described in the subpoena, Item 25 specifically permits Respondent-Petitioner to produce the relevant information "in such other form as most substantially provides the Commission with the requested information." In the alternative, Item 25 provides that "access to any records of Respondent which contain evidence described in the items enumerated above . . . will be accepted as compliance." Accordingly, we conclude that Respondent-Petitioner's argument is without merit.

Respondent-Petitioner contends that "the evidence sought by the subpoena is not described with sufficient particularity." We disagree. All that is required is that the documents be specified to the extent necessary for Respondent to be able to identify and produce the requested information. In this case we do not believe that there is

any question as to what information is needed. The subpoena seeks certain personnel and payroll records of the Charging Parties, other named individuals and other employees identified by job title or department and store location. The subpoena also seeks job descriptions, if any, for certain specified job titles, personnel manuals and other readily identifiable documents or records. To expect the Commission to supply the exact title, date of issuance or other similar information for each document requested is unreasonable since the Commission cannot possibly obtain that information without first seeing the subpoenaed documents. The Commission has already indicated that if the information requested does not exist in the exact form described in the subpoena, providing access to records which do contain the information is a permissible alternative to producing the documents themselves.

Respondent-Petitioner also argues that it would be unduly burdensome and oppressive to require that it produce the documents called for by the subpoena, which according to Respondent-Petitioner, number in the hundreds. However, it is well-established that where the Commission finds, as it does here, that the records sought are relevant or material to the charge or charges under investigation, a Respondent's assertion of burdensomeness will not warrant modification or revocation of a subpoena. Any inconvenience or difficulty in compliance (which is inherent in *any* compulsory process proceeding) must be considered as part of the social burden of living under government. *H. Kessler & Co.* v. *EEOC*, 53 F.R.D. 330 (N.D. Ga. 1971), *affirmed in pertinent part*, 468 F.2d 25 (5th Cir. 1972), *reaffirmed in pertinent part en banc*, 472 F.2d 1147 (5th Cir. 1973), cert. denied, —— U.S. ——, 5 EPD para. 8659 (1973).

Respondent-Petitioner additionally objects to the subpoena on the ground that it "calls for the production of records relating to a time not pertinent, relevant of admissible to any matter in question in this proceeding." For the most part the subpoena requests records covering a period of one or two years. In some instances, however, documents covering a three year period are sought, and

one item requests evaluations and rating records for certain employees over a period of four years. We note that Charging Parties have worked for Respondent-Petitioner for a number of years and that several of the charges date back to 1971 and 1972, while others are more recent. These circumstances, coupled with the fact that the subpoena represents seven charges all of which raise class issues, justify the time period for which records are being sought. We believe that the scope of the subpoena is entirely consistent with the discovery powers of the Commission recognized in numerous judicial decisions. E.g., *Georgia Power Co.* v. *EEOC*, 412 F.2d 421 (5th Cir. 1969) (discovery of data dating five years prior to the alleged violation permitted); *Sheet Metal Workers, Local 104* v. *EEOC*, 439 F.2d 237 (9th Cir. 1971) (discovery of events occurring prior to the effective date of the 1964 Act allowed). Accordingly, we do not feel that the period covered by the subpoena is unreasonable.

Respondent's final ground for requesting revocation of the subpoena is that witness or mileage fees have not yet been tendered to it. While witness fees are provided for in Section 710 of the Act and in the Commission's regulations, such fees are to be paid only in cases where testimony from witnesses is called for and are not appropriate for a subpoena duces tecum.

DETERMINATION

Respondent's petition to revoke the subpoena is denied.

The subpoena is modified to the extent that the addressee therein is required and directed to appear before James S. Bures, District Court of the Equal Employment Opportunity Commission in the City of Pittsburgh, Pa., on June 13, 10 a.m., 1975, to produce all of the documents described in the subpoena.

Approved by the Commission;
as demonstrated by the attached statements:

/s/ Edwardo Pena
Director of Compliance

Date: 5-9-75

/s/ Illegible

EXHIBIT "L"

DIRECTIVES TRANSMITTAL

Number 150

Date: May 21, 1975

SUBJECT: EEOC COMPLIANCE MANUAL.

Purpose. This transmittal covers a new Section 83, Disclosure of Information to Case Files of Volume 1, Procedures, EEOC Compliance Manual, which prescribes procedures for making available information contained in case files of EEOC.

Effective Date. Upon Receipt.

Distribution. Compliance Manual Holders, Volume 1.

Supply of Forms. EEOC Form 167, Agreement of Nondisclosure, is available through normal supply channels.

Obsolete Data. None.

Approved /s/ Edwardo Pena
Director, Office of Compliance

Approved /s/ Illegible
Executive Director

Approved /s/ Illegible
General Counsel

SECTION 83

DISCLOSURE OF INFORMATION IN CASE FILES

83.1 *General*—Section 709(e) of Title VII makes it unlawful for any employee of the the Commission to make public information obtained by the Commission pursuant to its general authority to investigate charges of discrimination prior to the institution of any proceeding under Title VII. The Fifth Circuit Court of Appeals has held (*Kessler* v. *EEOC*, 472 F.2d 1147 (5th Cir. 1973) 5 FEP Cases 405 that granting access to such information to charging parties or their attorneys prior to the institution of a proceeding under Title VII is not "making public" within the meaning of that term as used in section 709(e).

83.2 *Exceptions*

(a) *Disclosure of Information in Response to Subpoenas, Demands or Order of Courts or Other Authorities*—The procedures and policies of this section do not apply to disclosures of information from case files in response to subpoenas, demands or orders of courts or other authorities. The procedures in sub part B of the Commission's Regulations on Availability of Records (29 CFR 1610.30 through 1610.36) are to be followed in these circumstances.

(b) *Disclosure of Information When the Commission is a Party to Litigation*—Once a case file has been referred to Office of General Counsel to be used in litigation to which the Commission is a party or in any other case where the Commission is a party to litigation, the Office of General Counsel will control disclosures of information and all persons requesting disclosure from District Offices or National Programs Division (NPD) will be referred to the Office of General Counsel as provided in section 1610.34 of the Commission Regulations.

(c) *Disclosure of Information in Case Files to Representatives of Interested Federal, State or Local Authorities*—The procedures and policies of this section do not apply to disclosures of information in case files to representatives of interested Federal, State or local agencies. Such disclosures are to be made as appropriate and necessary to carrying out the Commission's responsibilities under the law in accordance with section 709(b) of Title VII and section 1601.20 of the Commission's Procedural Regulations.

83.3 *Conditions Precedent to Disclosure*—Information in case files may be disclosed on request to the persons indicated in 83.5 under the following conditions:

(a) *In connection with Pending or Contemplated Litigation*—Information in case files may be disclosed provided that the request is made for the purpose of reviewing information in the case file in connection with pending or contemplated litigation. Access to the information will not be granted prior to the expiration of the 180 day period prescribed at section 706(f)(1) of Title VII except when the charge has been dismissed or the aggrieved or charging party demonstrates a compelling need for access prior to the expiration of the 180 day period; and

(b) *Persons Requesting Disclosure Must Agree Not to Make the Information Public*—Information in case files may be disclosed only on the condition that the persons requesting disclosure agree in writing not to make the information obtained public except in the normal course of a civil action or other proceeding instituted under Title VII.

83.4 *Use of EEOC Form 167, Agreement of Nondisclosure (See Exhibit 83-A).* Each person to whom disclosure is made will sign a separate EEOC Form 167, Agreement of Nondisclosure, check the appropriate block to indicate identification and provide a complete address and telephone number. Completion of EEOC Form 167 will be accepted as evidence that the conditions in 83.3 are agreed to by the person requesting disclosure. The

Commission representative who signs the EEOC Form 167 on behalf of the Commission will normally be the District Counsel, District Director or other responsible professional employee in a supervisory position. Retain the original in the case file. A copy may be provided to the person requesting disclosure, if requested.

83.5 *Persons to Whom Information in Case Files May be Disclosed*—Information in case files may be disclosed on request, after complying with the expunction requirements discussed in 83.6, to *only* the following persons:

(a) Charging Parties and their attorneys (except as otherwise provided in 83.5(c) below):

(b) Aggrieved persons in case files involving Commissioner Charges and their attorneys provided that such persons have been notified of their status as aggrieved persons pursuant to section 1601.25(c) of the Commission's Procedural Regulations;

(c) Persons or organizations filing on behalf of an aggrieved person, provided that the aggrieved person has given written authorization to the person who filed on his or her behalf to act as the aggrieved person's agent for this purpose and their attorneys;

(d) Employees of Commission funded groups such as the Mexican-American Legal Defense and Education Fund and Lawyer's Committee for Civil Rights Under Law for the purpose of reviewing information in case files to determine the appropriateness of referral to private attorneys as a service to charging parties, provided that the conditions in 83.4 and 83.6 have been met and that the Commission funded group is reviewing the information at the request of the charging party;

(e) Respondents and their attorneys, provided that the charging party or aggrieved person has filed suit under Title VII; and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

AGREEMENT OF NONDISCLOSURE

Pursuant to Section 706(g)(1) of Title VII, the EEOC shall have power to cooperate with private individuals in order to accomplish the purposes of Title VII.

PERSON REQUESTING DISCLOSURE

☐ CHARGING PARTY	☐ RESPONDENT	☐ AGGRIEVED PERSON ON WHOSE BEHALF CHARGE IS FILED	☐ AGGRIEVED PERSON IN COMMISSIONER CHARGE	☐ NAMED PARTY IN CLASS ACTION

ATTORNEY REPRESENTING

☒ CP	☐ RESPONDENT	☐ AGGRIEVED PERSON ON WHOSE BEHALF CHARGE IS FILED	☐ AGGRIEVED PERSON IN COMMISSIONER CHARGE	☐ NAMED PARTY IN CLASS ACTION

CASE CHARGE NUMBER OF FILE(S) TO BE DISCLOSED

YP94-1151 and YP94-1152

STATEMENT

I John V. Evans (Typed name), request disclosure of Commission case file(s) in connection with contemplated or pending litigation. I agree that the information disclosed to me will not be made public or used except in the normal course of a civil action or other proceeding instituted under Title VII involving such information.

In witness whereof, this agreement is entered into as of the 5th day of May 19 75, by the Equal Employment Opportunity Commission representative named below and the person requesting disclosure.

John V. Evans 999-919-1010

(Person requesting disclosure (Signature and telephone number/area code))

Lopez, Evan and Fenwick, 1302 Dawn St., Point Barrow, Alaska 99999

(Complete address)

Jane Jones, District Counsel, Point Barrow District Office

(EEOC representative (Signature and title))

EEOC FORM MAY 75 167

Exhibit 83-A

(f) Any party in a class action complaint, provided that such party is actually named in the complaint as filed in Federal district court or is actually named by court order as a class member.

83.6 *Expunction of Confidential Material from Case Files Prior to Disclosure*

(a) *General*—Expunction of confidential material pursuant to this section will be strictly supervised by the District Counsel or Attorney Advisor in NPD, the District Director, Chief, NPD, or other responsible professional employee in the absence or non-availability of an attorney or the District Director. Supervision of expunction will not be further sub-delegated to non-professionals.

(b) *Statements and Identities of Witnesses Promised Anonymity*—Remove any information concerning the identities and statements by witnesses who have been promised anonymity by a Commission representative during the course of investigation or conciliation. The statements of such witnesses are to be clearly marked by the Commission representative who promised anonymity by placing the words "Confidential Witness—Do not Disclose this Statement" at the top and bottom of each page of each statement. The confidential witness's name is to be followed by the words "Confidential Witness" when used on the index to tabs in the case file. The name is to be obscured and the index photocopied so that only the words "Confidential Witness" appears on the index provided to persons requesting disclosure. A similar procedure is to be followed each place the confidential witness's name or information obtained from the witness appears in the case file.

(c) *Review Sheet on Commission Decisions*—Remove the review sheet covering Commission Decisions before disclosure because this review sheet records information concerning intra-governmental advisory and deliberative communications.

(d) *Intra-Agency and Inter-Agency Memoranda*—Remove the Investigator's Memorandum. Remove all memoranda, notes and other documents prepared by Commis-

PREVIOUS PAGE WAS BLANK

sion attorneys or received from other governmental agencies which contain recommendations or mental impressions as to strategy for settling the case or litigation. Remove all memoranda or notes from Regional Litigation Offices, from Office of General Counsel and from the Department of Justice.

(e) *Any Data on Other Respondents*—Remove all data naming other respondents which may be contained in the case file. The names of other respondents usually will be contained on EEOC Form 155, Pre-Investigation Charge Analysis, if charging party has filed charges against other respondents or on deferral correspondence which sometimes includes lists of charges deferred. The names of other respondents is to be obscured from such documents before disclosure.

(f) *Conciliation Materials*—All information in case files concerning the Commission's attempts to settle the charge by the informal methods of conference, conciliation and persuasion will be removed. The material to be removed includes: EEOC Form 134, Conciliation Case Analysis; EEOC Form 159, Log of Conciliation Actions; EEOC Form 156, Final Conciliation Summary; EEOC Form 180, Conciliation Benefits; Commission and respondent proposals and counter proposals; and all correspondence and any other information in the case file similar to that customarily contained in the items cited. EEOC Form 153, Invitation to Participate in Settlement Discussion, will be disclosed.

83.7 *Scope of Disclosure Permitted*

(a) *Employer Information Reports (EEO-1) or Other Reports Prescribed by the Commission Pursuant to Section 709(c)*—All reports required by the Commission from respondents covered by Title VII such as Employer Information Report (EEO-1), State and Local Government Information Report (EEO-4) will be disclosed if available in the District Office or National Programs Division notwithstanding the fact that these reports were not actually in the charging party's case file.

(b) *Information in Case Files Obtained from OFCC or Contract Compliance Agencies Under the EEOC/*

OFCC Memorandum of Understanding—Paragraph 5 of the Memorandum of Understanding between EEOC and OFCC signed September 11, 1974 provides as follows:

> "All requests by third parties for disclosure of information shall be referred to the agency which initially compiled or collected the information".

Information obtained from a contract compliance agency or OFCC pursuant to this agreement will be disclosed only to those persons entitled to disclosure under 83.5 and subject to the conditions in 83.3 and 83.4. Requests for this information from persons other than those in 83.5 should be referred to the agency which initially compiled or collected the information in accordance with section 1610.6 of the Commission's Regulations and EEOC Order 151 entitled: Disclosure of Information Under the Freedom of Information Act (but also see 83.2(c)).

(c) *Other Case Files Involving the Same Respondent*

(1) *General*—The Commission's policy is to cooperate with private Title VII litigants and to lend appropriate assistance in framing proper court complaints by allowing, when requested, access to information in other case files involving the same respondent which are available in the same District Office or National Programs Division, provided that the information in the other case files is relevant or material to the private litigant's case.

(2) *Determining When Information in Other Case Files is Relevant or Material*—Information in other case files is relevant or material when other case files contain charges, investigations or determinations involving the same basis (e.g. sex, religion, national origin, race) with limited exceptions such as when the private litigant's case alleged discrimination in promotion against females and the other case file involved a male's claim that he was not hired because of respondent's policy of not hiring long haired males. Other case files may be relevant or material if they involve a different basis only when the treatment afforded one protected class is probative of treatment afforded the private litigant's class (e.g. systemic discrimination against Spanish Surnamed

Americans is often probative as to treatment accorded blacks and vice versa).

(3) *Safeguard the Identity of Person on Whose Behalf Charge was Made When Disclosing Other Case Files Involving the Same Respondent*—Section 1601.6 of the Commission's Procedural Regulations provides that the Commission shall safeguard and keep confidential the name and address of any person on whose behalf a charge is made. When disclosing information in other case files involving the same respondent, remove any material which would reveal the name or address of any person on whose behalf a charge was made including EEOC Form 151, Third Party Certification of Charge, (or any other document serving the same purpose), the affidavit required by 2.3(f) in which the person on whose behalf a charge is made acknowledges aggrievement or any other documents which contain the name or address of the person on whose behalf a charge was made. When constructing the case file, a procedure similar to that described in 83.6(b) is to be followed, i.e. clearly mark the index tabs in the case file and mark each document which contains information which the Commission is required to safeguard pursuant to section 1601.6 of the Commission's Procedural Regulations.

(4) *District Director or Chief, NPD, Decision as to Relevant or Material is final*—Because the policy of allowing access to information in other case files is discretionary on the part of the Commission the decision of the District Director or Chief, NPD, is final when made and may not be appealed. However, any District Director or Chief, NPD may reconsider on his or her own motion any decision made as to relevancy.

83.8 *Collection and Disposition of Fees for Copying*—Fees for photocopying will be assessed or waived in accordance with the schedule of fees contained at sections 1610.15 of the Commission's Regulations. Collections and disposition of fees will be in accordance with EEOC Order 471. Persons granted access to information in case files will not normally be permitted to remove case files from Commission premises except that the District Director or Chief, NPD, may allow a file to be copied

away from Commission premises if unusual circumstance warrant and proper safeguards are observed to prevent loss or mutilation of the file. District Office or National Programs Division personnel will photocopy materials on request; however, if a request for photocopying involves unusual problems of reproduction or handling, District Director or Chief, NPD may require persons requesting copies to make special arrangements. Persons granted access are to be encouraged to minimize the amount of photocopying by Commission employees by first carefully inspecting the information in the case file and making a judicious selection of the materials to be photocopied.

83.9 *Copy of this Section may be Provided to Persons who Sign EEOC Form 167*—A photocopy of this section will be provided to persons who sign an EEOC Form 167 at no cost.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(RICHMOND DIVISION)

Civil Action No. 75-0297R

ASSOCIATED DRY GOODS CORP., PLAINTIFF

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
DEFENDANT

MOTION TO DISMISS

The Defendant Equal Employment Opportunity Commission hereby moves the Court to dismiss the complaint in this action on the ground that the Court lacks jurisdiction over the subject matter thereof, as more fully outlined in the Defendant's memorandum of points and authorities in support of this motion.

Respectfully submitted,

ABNER W. SIBAL
General Counsel

ISSIE L. JENKINS
Associate General Counsel
Legal Counsel Division

CONSTANCE L. DUPRE
Supervisory Attorney

/s/ Anthony DeMarco
ANTHONY DEMARCO
Attorney for the Defendant
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
2401 E Street, Northwest
Washington, D.C. 20506

LOCAL COUNSEL: Assistant U. S. Attorney
U.S. Post Office Building
10th and Main Streets
Post Office Box 1257
Richmond, Virginia 23210

ATTACHMENT A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. ———

ASSOCIATED DRY GOODS CORPORATION, PLAINTIFF

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
DEFENDANT

AFFIDAVIT OF RITA M. SMITH

STATE OF PENNSYLVANIA
COUNTY OF ALLEGHENY

Rita M. Smith, being duly sworn, deposes and says,

1. That she is employed as Equal Employment Specialist at the Pittsburgh District Office of the Equal Employment Opportunity Commission.

2. That in the week of March 4th, 1974 she attempted to investigate seven charges of discrimination against Joseph Horne Company, EEOC Charge Nos. TPI2-0454, TPI3-0836, TPI3-0774, TPI2-0324, TPI2-0323, TPI2-0484 and TPI2-0562. Respondent Joseph Horne Company refused to allow her to investigate and interview witnesses.

3. That on March 15th, 1974 Rita M. Smith again attempted to investigate the aforementioned EEOC charges and to examine and copy records of Respondent. Respondent again refused her access to relevant records and refused to allow her to interview witnesses whom she named. However, Respondent indicated that Ms. Smith could interview its selected witness. Ms. Smith declined this invitation.

4. That Ms. Smith sent a copy of a letter addressed to Joseph Horne Company to Louis Kushner, Charging Parties' attorney on February 25th, 1974. Ms. Smith mistakenly believed at that time that Mr. Kushner was counsel to Joseph Horne Company rather than counsel to Charging Parties.

/s/ Rita M. Smith
RITA M. SMITH

Sworn to and subscribed before me this 27th Day of July, 1975.

/s/ Louise Ann Conaly
LOUISE ANN CONALY

JACKSON, LEWIS, SCHNITZLER & KRUPMAN
Attorneys at Law
261 Madison Avenue
New York, N.Y. 10016
212-697-8200

December 8, 1975

The Honorable Robert H. Merhige, Jr., U.S.D.J.
United States District Court
Eastern District of Virginia
Post Office Building
10th & Main Streets
Richmond, Va. 23219

Re: Associated Dry Goods Corporation v. E.E.O.C.
U.S.D.C., E.D. Va., Civ. Action No. 75-297-R

Dear Judge Merhige:

We are in receipt of the E.E.O.C.'s reply memorandum in the above matter, submitted nearly a month after Associated Dry Goods Corporation (A.D.G.) filed its response to the Commission's motion to dismiss. For the most part, the arguments made in the E.E.O.C. reply memorandum are repetitive of those raised originally by the Commission in its motion; we have dealt with them in A.D.G.'s memorandum in opposition. There are few items, however, which deserve comment. We direct our remarks to them below.

I. *The Affidavit of E.E.O.C. Investigator Rita Smith*

A. In an affidavit of Equal Employment Specialist Rita M. Smith, annexed to the reply memorandum, the Commission seeks to neutralize the effect of its unauthorized and unlawful disclosures in this case. Instead, it only succeeds in focusing attention on the wrongful acts. Ms. Smith avers that she:

> ". . . sent a copy of a letter addressed to Joseph Horne Company to Louis Kushner, Charging Parties'

> attorney on February 25th, 1974. Ms. Smith mistakenly believed at that time that Mr. Kushner was counsel to Joseph Horne Company rather than counsel to Charging Parties."

Smith affidavit, at 2, par. 4. The letter referred to by Ms. Smith itself disclosed the existence of other charges against Horne's. Of still more concern, however, were the attachments to the letter: a detailed interrogatory providing the knowledgeable reader with a very good idea of the nature of the unproven charges against Horne's (Exh. B to Complaint), and copies of two of the charges against Horne's filed by individuals who had not retained Mr. Kushner as counsel.

There is another question raised—or resurrected, to be more exact,—by the Smith affidavit: How many Charging Parties does Mr. Kushner represent? In attempting to explain the transmittal of information to attorney Kushner, the Commission's District Director originally stated that Mr. Kushner represented two charging parties (Exh. E to Complaint). Later, however, he said that Mr. Kushner only represented one such person (See copy of letter attached). Now, in her affidavit, Specialist Smith refers to Mr. Kushner as the "Charging Parties' attorney" and "counsel to Charging Parties," clearly indicating plural representation, but failing to specify the number or identities of his clients.

The foregoing is cause for much concern in the context of this case. The disclosures, we stated in our memorandum, were made in apparent violation of §§ 706(b) and 709(e) of Title VII (at 3 n.2). Just as importantly, however, they reveal a laxity of administrative control by the Commission over the maintenance and dissemination of information in its possession. The evident confusion over the role of attorney Kushner, which still persists after nearly two years, shockingly confirms this view. Prudence dictates that A.D.G.'s Horne's Division not place faith in the willingness or ability of the E.E.O.C. to protect the confidentiality of its records—even where the Commission concedes confidentiality is required by statute. Its reluctance to permit a free-

wheeling, all-inclusive inquiry into Horne's practices and records by this agency, without any apparent interest in or capability for protecting Horne's interests, is not only understandable, but unavoidable.

B. Ms. Smith's affidavit also asserts that Horne's refused to allow her to investigate, interview witnesses, and examine relevant records, in connection with seven charges, in March, 1974 (at 1, pars. 2, 3). The facts are otherwise.

The principal subject of discussion at the meetings adverted to by Ms. Smith—on March 6 and March 14—involved the charge filed by Alice Corvino. With respect to this charge, alleging sex discrimination, Horne's had been sent a notice of charge by the Commission erroneously citing race or color as the basis thereof. At the March 6 meeting, Ms. Smith advised that the charge alleged sex discrimination, and immediately requested the personnel files of employees assertedly named by the charging party. When asked to first provide the specifics of the Corvino charge, Ms. Smith refused to do so. Instead she insisted upon being granted access to the files. Horne's attorney, Robert Lewis, expressed concern over the notation on the District Director's letter indicating that copies of the District Director's February 25 letter and accompanying material had been sent to attorney Kushner. He then told Ms. Smith that the Company would respond to her request for access to files at their next meeting.[1]

On March 14, Horne's made available several supervisors of Ms. Corvino, knowledgeable about her employment, for interviews by Ms. Smith. Ms. Smith declined to speak with them, and insisted that she be granted access to employment records. Attorney Lewis then advised Ms. Smith that unless she were willing to inform the Company of the relevance of the records sought to the Corvino charge, the Company would not produce them. When Mr. Lewis inquired whether Ms. Smith had any

[1] Also at the meeting, Ms. Smith advised that the Commission would pursue its investigation on another of the charges which a previous investigator had indicated was concluded.

specific questions concerning Ms. Corvino's employment, or sought specific information, investigator Smith responded again that she wanted to see all the personnel records. Mr. Lewis then expressed concern at the broad scope of the Commission's investigation, and the work entailed in collecting the information sought. Ms. Smith did not indicate that she wanted to interview witnesses of her own choice. On both March 6 and 14, Ms. Smith adverted to the likelihood of Court action in such a manner as to indicate a litigious approach to the investigation.[2] Thus, Horne's did not impede a proper investigation.

II. *The Requirements of Title VII and Disclosure*

The central issue raised by the complaint is whether the Commission may release information obtained from employer respondents to charging parties and other private persons, without regard to the nature of the information, in particular, its confidential character. Arguing that A.D.G.'s attack "strikes at the jugular of the Commission," the E.E.O.C. suggests that the Company seeks to prevent the Commission from disclosing data even to other federal, state and local governmental agencies. (E.E.O.C. reply memorandum, at 4). A.D.G. seeks no such rule. While the Privacy Act of 1974, 5 U.S.C. § 552a, addresses this problem, the immediate question in this case involves a wholesale disclosure of data in investigative files to private, adverse parties, *prior to the commencement of litigation.*[3] It does not involve, as the defendant exaggerates, publication "to the world." (E.E.O.C. reply memorandum, at 4). The disclosure contested here is abusive and unnecessary, even under

[2] These facts should be the subject of testimony in an evidentiary hearing rather than affidavits or arguments of counsel. Yet, by raising these very questions, the E.E.O.C. suggests that its own motion is inappropriate. There do exist genuine issues of material fact which require an evidentiary record.

[3] The Commission denies access to these same files to a respondent prior to commencement of suit. E.E.O.C. Compliance Manual, § 83.5(e) (Exh. L. to Complaint).

the Commission's overdramatized view that aggrieved individuals should be given assistance "to formulate their complaints and redress the David and Goliath aspect of employment discrimination where an employee stands alone against the corporate employer." (E.E.O.C. reply memorandum, at 4 n.3). Assistance short of such disclosure may be provided without jeopardizing legitimate business interests in confidentiality. In any case, the E.E.O.C.'s argument ignores the fact that before David's first stone is cast, the Commission should seek to determine through cooperative means whether discrimination exists, and if so, to correct it through conciliation. The Commission's disclosure rules are incompatible with this primary obligation. Therefore, it is not A.D.G. who is threatening to prevent the Commission from carrying out its statutory duties; rather, it is the Commission itself, by its own short-sighted and self-defeating regulations.

III. *Jurisdiction and the Decision in Sears, Roebuck & Co.*

The Commission asserts the recent decision in *Sears, Roebuck & Co.* v. *G.S.A.*, —— F. Supp. ——, 11 F.E.P. Cases 727 (D.D.C. 1975), "squarely decided" that "the Freedom of Information Act gives a plaintiff no cause of action where the government decides to disclose records but the plaintiff seeks to prevent such disclosure." (E.E.O.C. reply memorandum, at 3). This attribution is incorrect.

Sears held that where the government maintains that the F.O.I.A. requires disclosure of certain documents, a litigant may invoke the F.O.I.A. and the Declaratory Judgment Act to obtain an adjudication of the contention—a "reverse F.O.I.A." case in fact if not in name. In the instant matter, the E.E.O.C. asserts that Title VII requires the disclosure of case files as part of its statutory duties. (E.E.O.C. reply memorandum, at 2). Even under the *Sears* rationale, A.D.G. may obtain a similar adjudication under Title VII and the Administrative Procedure Act. In this context, the F.O.I.A. exemptions

are relevant "as guidelines in measuring the agency's action," [4] and their underlying policies "provide a sound basis for determining whether release of the documents in question would be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Sears, Roebuck & Co.* v. *G.S.A.*, 389 F. Supp. 996, 8 F.E.P. Cases 1155, at 1158, (D.D.C. 1974). How much more arbitrary, capricious and abusive are the authorized disclosures where, as here, the agency refuses even to recognize that investigative documents may be confidential, and fails to provide any administrative mechanism for determining whether they are or not. We find the Commission's argument based on *Sears* disingenuous and unpersuasive.

IV. *Review of Agency Action*

The Commission engages in extensive discussions based on *Littel* v. *Morton*, and the *Abbott Laboratories—Toilet Goods* trilogy.[5] The import of these decisions has been treated at length in our memorandum in opposition to the motion to dismiss (at 17-21, 23-26). With respect to *Littell* v. *Morton*, *supra*, we pause here only to observe that the Commission appears to be reduced to arguing that issuance of a subpoena is not agency action. While we find this argument frivolous, it is to be noted that the E.E.O.C. fails to mention the Commission's Determination denying A.D.G.'s petition to revoke the subpoena (Exh. K to Complaint). There can be no question but that the Determination constitutes final agency action from which judicial course may be sought.

With respect to the *Abbott Laboratories—Toilet Goods Ass'n.* cases, *supra*, we believe A.D.G. has shown the necessary elements to justify the assertion of jurisdiction.

---

[4] *Id.*, at 730.

[5] *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Toilet Goods Ass'n.* v. *Gardner*, 387 U.S. 158 (1967); *Gardner* v. *Toilet Goods Ass'n.*, 387 U.S. 167 (1967). See, E.E.O.C. reply memorandum, at 5-9.

V. *The Existence of Triable Issues*

Finally, we note the Commission's apparent uncertainty as to a most important issue raised in these proceedings. The E.E.O.C. now states: "It is *not clear* that the subpoena records are confidential as to a charging party, see *H. Kessler & Co.* v. *E.E.O.C., supra.*" (E.E.O.C. reply memoranda, at 10) (emphasis added). Dismissal of an action before trial must be based on more than debatable points of law, in an uncertain factual setting. The Commission has failed to show that A.D.G. could present no state of facts under which it would be entitled to relief under one or more of the legal bases relied upon. To the contrary it demonstrates that there exist substantial questions of fact which are properly litigated at trial. Dismissal is inappropriate in these circumstances.

For the foregoing reasons, A.D.G. again requests that the Commission's motion to dismiss be denied.

Respectfully submitted

JACKSON, LEWIS, SCHNITZLER & KRUPMAN

/s/ Roger S. Kaplan
ROGER S. KAPLAN
HUNTON, WILLIAMS, GAY & GIBSON

By: Hill B. Wellford, Jr.

RSK/ec.

cc: Anthony J. DeMarco, Esq.
David A. Schneider, Esq.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

AGREEMENT OF NONDISCLOSURE

Pursuant to Section 705g(1) of Title VII, the EEOC shall have power to cooperate with private individuals in order to accomplish the purposes of Title VII.

PERSON REQUESTING DISCLOSURE

CHARGING PARTY	RESPONDENT	AGGRIEVED PERSON ON WHOSE BEHALF CHARGE IS FILED	AGGRIEVED PERSON IN COMMISSIONER CHARGE	NAMED PARTY IN CLASS ACTION

ATTORNEY REPRESENTING

☒ CP ☐ RESPONDENT ☐ AGGRIEVED PERSON ON WHOSE BEHALF CHARGE IS FILED ☐ AGGRIEVED PERSON IN COMMISSIONER CHARGE ☐ NAMED PARTY IN CLASS ACTIO

CASE CHARGE NUMBER OF FILE(S) TO BE DISCLOSED

TPL3-0774

STATEMENT

I Samuel A. Vitaro, request disclosure of Commission case file(s) in connection with contemplated or pending litigation. I agree that the information disclosed to me will not be made public or used except in the normal course of a civil action or other proceeding instituted under Title VII involving such information.
(Typed name)

In witness whereof, this agreement is entered into as of the 10th day of March 1976 by the Equal Employment Opportunity Commission representative named below and the person requesting disclosure.

Samuel A Vitaro (412) 281-4200

Person requesting disclosure (Signature and telephone number/area code)

508 Law & Finance Bldg. Pgh. Pa. 15219

Complete address

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PREVIOUS PAGE WAS BLANK

...t a complaint, fill in this form and ...il it to the Equal ...ployment Opportunity Commission's Regional Office in your ...In most cases, a charge must be filed with the EEOC within ...pecified time after the discriminatory act took place. IT IS ...EREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS ...SSIBLE.

This form is to be used ... to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. 171 2 543

(PLEASE PRINT OR TYPE)

Your Name (Mr., Mrs., Miss) (Mrs. indicate) Katherine Murray Phone Number 321-4605

Street Address 62 Harlan Ave

City Pittsburgh State Pa. Zip Code 15214

WAS THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☒ Religious Creed ☐ National Origin ☐ Sex ☐

Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Name Joseph Horne Co.

Street address Penn & Stanwix ST

City Pittsburgh State Pa Zip Code 15222

AND (other parties if any)

Have you filed this charge with a state or local government agency? Yes ☐ When ___ MONTH ___ DAY ___ YEAR No ☒

Discussed with Pittsburgh Commission. No signed complaint. (3/31/71)

If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒

The most recent date on which this discrimination took place: Month October Day 21 Year 1971

Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

Dismissed so they would not have to promote me because they did not want a black person as a supervisor over a predominately white staff. A white I was employed was paid less than white persons who were less qualified.

They harassed me by providing a series of dangerous working conditions to develop without making any investigation.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date November 16, 1971 Katherine E. Murray (Sign your name)

Subscribed and sworn to before me this 16th day of November 1971

Notary Public (Title)

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you get the form sworn to.

U.S. GOVT. PRINTING OFFICE: 1971-O-430-801

FORM [illegible]

82

CHARGE OF DISCRIMINATION

(If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. TP12 0562

(PLEASE PRINT OR TYPE)

859

1 Your Name (Mr., Mrs., Miss) indicate Marlene I. Denk Phone Number 244-7362

Street Address 500 Point View Road

City Pittsburgh, State PA Zip Code 15227

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☐ Religious Creed ☐ National Origin ☐ Sex ☒ (F)

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Name Joseph Horne Company

Street address 501 Penn Avenue

City Pittsburgh State PA Zip Code

AND (other parties if any)

RECEIVED IN PITTSBURGH DISTRICT OFFICE FEB 28 1972

4 Have you filed this charge with a state or local government agency? Yes ☐ When MONTH DAY YEAR No ☒

5 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒

6 The most recent date on which this discrimination took place: Month 2 Day 24 Year 72 con't.

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

I have been employed as a clerical employee in the Protection Office of the above-named respondent company for a period of five years. On February 24, 1972, I was informed that I would be trained as a store detective and would have to perform several difficult tasks in several different job categories. A large amount of travel and difficult hours would be involved. I feel that this action has been taken against me as a technique of harassment because of my previous contact with the Equal Employment Opportunity Commission and involvement with others that have filed charged with this Commission and that this is part of a planned action of retaliation against those in my department have dealt with the EEOC. I also feel that the company has discriminated against women as a class in the terms and conditions of employment and that these actions are in direct violation of Title VII of the Civil Rights Act of 1964.

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date 2/28/72 Marlene I. Denk (Sign your name)

Subscribed and sworn to before me this 28 day of February 19 72

Carol Cathcart Equal Employment Opportunity Officer (Title)

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form sworn to.

FORM APPR BUR. OF BUDGET—No. 124-R0001 FORM EEOC-5 (REV. 7-71)

CHARGE OF DISCRIMINATION

(If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. TPI2-0323

(PLEASE PRINT OR TYPE)

1 Your Name (Mr., Mrs., Miss) (indicate) Helen A. Pollock Phone Number 486-6037

Street Address 3979 Lawrence Avenue

City Allsion Park State Pennsylvania Zip Code 15101

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☐ Religious Creed ☐ National Origin ☐ Sex ☒

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Name Joseph Horne Co.

Street address 501 Penn Avenue

City Pittsburgh State Pennsylvania Zip Code 3

AND (other parties if any)

RECEIVED IN PITTSBURG DISTRICT OFFICE JAN 3 1972

4 Have you filed this charge with a state or local government agency? Yes ☐ When ____ (MONTH) ____ (DAY) ____ (YEAR) No ☒

5 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒

6 The most recent date on which this discrimination took place: Month January Day 3 Year 1972 cont.

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

The respondent employer has in the past and continuously thereafter to date discriminated against women by promoting and/or hiring only men into supervisory positions even though the women were as equally qualified and able to perform the job as the men.

The respondent employer has in the past and continuously thereafter to date discriminated against women by paying them lower wages and benefits than men even though men and women perform substantially the same job duties.

I feel this represents discrimination against women as a class and is a direct violation of Title VII of the Civil Rights Act of 1964.

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date 1-3-72 Helen A. Pollock (Sign your name)

Subscribed and sworn to before me this 3 day of January 19 72

Notary Public Equal Employment Opportunity Commission

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form sworn to.

FORM APPR BUR OF BUDGET—No. 124-R0001 FORM EEOC-5 (REV. 7-69)

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CHARGE OF DISCRIMINATION

(If you have a complaint, fill in this form and ...d it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used ... to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORICIN.

Case File No. TP12 0484

(PLEASE PRINT OR TYPE)

1 Your Name (Mr., Mrs., Miss indicate) Mary Kritko Phone Number 461-5864

Street Address 423 9th Avenue

City Munhall State Pa. Zip Code 15120

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☐ Religious Creed ☐ National Origin ☐ Sex ☒

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Name Joseph Horne Co.

Street address 501 Penn. Avenue

City Pittsburgh State Pa. Zip Code

AND (other parties if any)

RECEIVED JAN 19 1972

4 Have you filed this charge with a state or local government agency? Yes ☐ When MONTH DAY YEAR No ☒

5 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒

6 The most recent date on which this discrimination took place: Month January Day 17 Year 72

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

On July 23, 1969 I sustained an on-the-job injury while working for the above-mentioned respondent. I was not adequately compensated financially and was not given fair treatment during the resulting hearing and adjustment period. Because of the respondents disparate treatment of myself I have lost wages and benefits for a continuing period of time.

Also, the respondent employer has in the past and continuously thereafter to date discriminated against women as a class by not promoting them into supervisory positions and paying them lower wages than men for substantially the same work.

I feel this discrimination against women as a class is in direct violation of Title VII of the Civil Rights Act of 1964.

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date 1/17/72 Mary Kritko (Sign your name)

Subscribed and sworn to before me this 17 day of January 19 72

(Name) Equal Employment Officer (Title)

... sign your own name and mail to the Regional Office. The Com... S...

to ... THIS SECTION.

FORM APP.: BUR. OF BUDGET—No. 124-R0001 FORM EEOC-5 (REV. 7-...)

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CHARGE OF DISCRIM.. ATION	EEOC CHARGE NO. 1P73-0836	FORM APPROVED OMB NO. 124-R0001

INSTRUCTIONS

If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's District Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE. *(Attach extra sheets of paper if necessary.)*

CAUSE OF DISCRIMINATION

- ☐ RACE OR COLOR
- ☒ SEX
- ☐ RELIGIOUS CREED
- ☐ NATIONAL ORIGIN

NAME *(Indicate Mr. or Ms.)*	DATE OF BIRTH
Ms, Marsue Dingley	8-28-47
STREET ADDRESS: 903 Chestnut Avenue — COUNTY: Allegheny	SOCIAL SECURITY NO.: 186-40-1151
CITY, STATE, AND ZIP CODE: Pittsburgh, PA 15234	TELEPHONE NO. *(Include area code)*: 343-0517

THE FOLLOWING PERSON ALWAYS KNOWS WHERE TO CONTACT ME

NAME *(Indicate Mr. or Ms.)*	TELEPHONE NO. *(Include area code)*
Mrs. Dingley	343-0517
STREET ADDRESS: 903 Chestnut Avenue	CITY, STATE, AND ZIP CODE: Pittsburgh, PA 15234

LIST THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT WHO DISCRIMINATED AGAINST YOU *(If more than one, list all)*

NAME	TELEPHONE NO. *(Include area code)*
Joseph Hornes Company	261-3000 x 884
STREET ADDRESS: Stanwix Street	CITY, STATE, AND ZIP CODE: Pittsburgh, PA 15222

OTHERS WHO DISCRIMINATED AGAINST YOU *(If any)*:

CHARGE FILED WITH STATE/LOCAL GOV'T. AGENCY	DATE FILED	AGENCY CHARGE FILED WITH *(Name and address)*
☐ YES ☒ NO		

APPROXIMATE NO. OF EMPLOYEES/MEMBERS OF COMPANY OR UNION THIS CHARGE IS FILED AGAINST	DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE *(Month, day, and year)*
over 25	June 5, 1973

Explain what unfair thing was done to you and how other persons were treated differently. Understanding that this statement is for the use of the United States Equal Employment Opportunity Commission, I hereby certify:

I have been discriminated against by the above named respondent employer because of my sex, Female, in promotion, reprisal due to prior contact with Equal Employment Opportunity Commission, and general terms and conditions of employment which is in direct violation of Section 704 of Title VII of the Civil Rights Act of 1964, as amended.

DISTRICT OFFICE
6 PM 2 24

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

DATE	CHARGING PARTY *(Signature)*
6/6/73	[signature]

Subscribed and sworn to before this EEOC representative:

DATE	SIGNATURE AND TITLE
6/6/73	Equal Employment Officer

NOTARY PUBLIC

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE *(Day, month, and year)*

SIGNATURE *(If it is difficult for you to get a Notary Public to act in this, sign your own name and mail to the District Office. The Commission will notarize the charge for you at a later date.)*

CHARGE OF DISCRIMINATION

EEOC CHARGE NO. TPI 3- 0774

FORM APPROVED OMB NO. 124-R0001

INSTRUCTIONS

If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's District Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE. *(Attach extra sheets of paper if necessary.)*

CAUSE OF DISCRIMINATION

- ☐ RACE OR COLOR
- ☒ SEX
- ☐ RELIGIOUS CREED
- ☐ NATIONAL ORIGIN

NAME *(Indicate Mr. or Ms.)*
Alice M. Corvino

DATE OF BIRTH
~~8/3/28~~ 2/8/44

STREET ADDRESS
436 Millers Lane

COUNTY

SOCIAL SECURITY NO.
195-34-0772

CITY, STATE, AND ZIP CODE
Pittsburgh

TELEPHONE NO. *(Include area code)*
793-1478

THE FOLLOWING PERSON ALWAYS KNOWS WHERE TO CONTACT ME

NAME *(Indicate Mr. or Ms.)*
The above is permanent

TELEPHONE NO. *(Include area code)*

STREET ADDRESS

CITY, STATE, AND ZIP CODE

LIST THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT WHO DISCRIMINATED AGAINST YOU *(If more than one, list all)*

NAME
Joseph Horne Company

TELEPHONE NO. *(Include area code)*

STREET ADDRESS
Downtown location - Penn Avenue

CITY, STATE, AND ZIP CODE
Pittsburgh, Pa.

OTHERS WHO DISCRIMINATED AGAINST YOU *(If any)*

CHARGE FILED WITH STATE/LOCAL GOV'T. AGENCY
☒ YES ☐ NO

DATE FILED

AGENCY CHARGE FILED WITH *(Name and address)*

APPROXIMATE NO. OF EMPLOYEES/MEMBERS OF COMPANY OR UNION THIS CHARGE IS FILED AGAINST

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE *(Month, day, and year)*
Continuous

Explain what unfair thing was done to you and how other persons were treated differently. Understanding that this statement is for the use of the United States Equal Employment Opportunity Commission, I hereby certify:

The Joseph Horne Company discriminated against my female sex through promotions and wages. I believe the company continuously discriminates against females with respect to promotions and wages. Because of these conditions, I terminated my employment with the Joseph Horne Company. Though I was employed with them for 10 years, I was not able to rise above the position of staff assistant.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

DATE
8/13/73

CHARGING PARTY *(Signature)*
Alice M. Corvino

Subscribed and sworn to before this EEOC representative.

DATE
8/13/74

Equal Employment Specialist

NOTARY PUBLIC

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE *(Day, month, and year)*

SIGNATURE *(If it is difficult for you to get a Notary Public to act this, sign your own name and mail to the District Office. The Commission will notarize the charge for you at a later date.)*

EEOC FORM 5 (Rev. 12-72) Previous editions of this form may be used.

GPO 862-415

CHARGE OF DISCRIMINATION

(If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. TPI2-0324

(PLEASE PRINT OR TYPE)

1 Your Name (Mr., Mrs., Miss, indicate) Lois Blake Phone Number ~~331-2336~~ 421-7512

Street Address 1225 Adon Street

City Pittsburgh State PA Zip Code 15204

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☐ Religious Creed ☐ National Origin ☐ Sex ☒ ~~x~~-Female

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Name Joseph Horne Company

Street address 501 Penn Avenue

City Pittsburgh State PA Zip Code 15222

AND (other parties if any)

4 Have you filed this charge with a state or local government agency? Yes ☐ When ____ MONTH ____ DAY ____ YEAR No ☒

5 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒

6 The most recent date on which this discrimination took place: Month 2 Day 14 Year 72

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

Since September 15, 1969, I have been employed as a Store Detective in Department 530-10 of the above-named respondent company. I had long been aware of disparate treatment of females by the company in regards to wage rates, promotions, and other terms and conditions of employment. About the latter part of December 1971, I contacted the Pittsburgh District Office of the E.E.O.C. three times by telephone and two times by personal visit and discussed the employment situation at the respondent company. My supervisor the Head of Security, was subsequently made aware of my activities. On February 14, 1972, I was discharged by the company for allegedly making a false arrest. The arrest was not without probable cause and other employees committing the same act were not discharged.

I strongly believe my discharge was a retaliation against my contact with the E.E.O.C. and that this action, as well as the company's discrimination against women as a class, in terms of employment is in direction violation of Title VII of the Civil Rights Act of 1964.

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date February 15 1972 Lois E. Blake (Sign your name)

Subscribed and sworn to before me this 15th day of February 1972

Carol J. Bok Equal Employment Opportunity Officer (Title)

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form sworn to.

FORM APPR. BUR. OF BUDGET—No. 124-R0001 FORM EEOC-5 (REV. 7-68)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 75-297-R

ASSOCIATED DRY GOODS CORPORATION, PLAINTIFF

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
DEFENDANT

ORDER

For the reasons referred to in the Memorandum of the Court, this day filed, and deeming it proper so to do, it is ADJUDGED and ORDERED that the defendant's motion to dismiss be, and the same is hereby, denied in part and sustained in part, as referred to in said Memorandum.

Let the Clerk send a copy of this Order to all counsel of record.

/s/ Robert A. Merhige
ROBERT A. MERHIGE
United States District Judge

Date: JUNE 25, 1976

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 76-0297-R

ASSOCIATED DRY GOODS CORPORATION, PLAINTIFF

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (E.E.O.C.), and ETHEL B. WALSH, individually and as "Acting Chairman," and permanent Vice Chairman of the E.E.O.C., DANIEL E. LEACH, individually and as Member of the E.E.O.C., COLSTON A. LEWIS, individually and as Member of the E.E.O.C., RAYMOND L. TELLES, individually and as Member of the E.E.O.C., ALVIN L. GOLUB, individually and as Acting Executive Director of the E.E.O.C., ABNER W. SIBAL, individually and as General Counsel of the E.E.O.C., EDUARDO PENA, JR., individually and as Director of Compliance of the E.E.O.C., and EUGENE V. NELSON, individually and as District Director, Pittsburgh, Pennsylvania, District Office, of the E.E.O.C., DEFENDANTS

ANSWER

Ethel Bent Walsh, Acting Chairman of the defendant Equal Employment Opportunity Commission and permanent Vice Chairman, on behalf of the Commission and herself in her official capacity, and individually, and each of the other defendants, each in their official capacity and individually, for their answer to the complaint, respectfully allege:

1. Defendants admit each and every allegation of Paragraph 1 of the Complaint.

2. Defendants deny each and every allegation of Paragraph 2 of the Complaint.

3. Defendants deny each and every allegation of Paragraph 3 of the Complaint. The Complaint does not set forth any facts to warrant the conclusion that there

is such an amount ($10,000) involved, and Defendant denies the jurisdiction of the Court in this case.

4. and 5. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 4 and 5 of the Complaint.

6. Defendants deny each and every allegation of Paragraph 6 of the Complaint except that Defendants admit that the Commission is an agency of the Federal Government created under § 705 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-4.

6(a) Defendants admit each and every allegation of Paragraph 6(a) of the Complaint.

6(b) Defendants admit that the Commission has its principal offices in the City of Washington, District of Columbia. Defendants deny that the Commission's principal place of business is in the City of Washington, District of Columbia. The defendant Commission has offices in 32 cities spread throughout the continental limits of the United States. For a listing see 29 C.F.R. § 1610.4(c).

6-1(a)(b) and (c) Defendants admit each and every allegation of paragraph 6-1(a), (b), and (c) of the Complaint except that Alvin L. Golub is not the Acting Executive Director but the Deputy Executive Director.

6-1(d). Defendants deny the allegations of paragraph 6-1(d) of the Complaint.

7. Defendants deny that Alice M. Corvino filed a sex discrimination charge against Horne's on July 25, 1973. Defendants otherwise admit each and every allegation of Paragraph 7 of the Complaint.

8. Defendants admit each and every allegation of Paragraph 8 of the Complaint except that Defendants deny that Alice M. Corvino filed her charge on July 25, 1973.

9. Defendants admit each and every allegation of Paragraph 9 of the Complaint.

10. Defendants admit each and every allegation of Paragraph 10 of the Complaint.

11. Defendants deny each and every allegation of the first sentence of Paragraph 11 of the Complaint. The

attorney, Louis B. Kushner, represented, on February 25, 1974, the seven charging parties whose cases were being investigated by the Defendant Commission. The February 25, 1974, letter described in the Complaint was inadvertently sent to Mr. Kushner. With regard to the second and third sentences of Paragraph 11 of the Complaint, the Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

12. The Defendants deny each and every allegation of Paragraph 12 of the Complaint except that the Defendant Commission admits that it attempted to conduct an investigation of Joseph Horne Company during the week of March 4, 1974, and that the agents for Joseph Horne Company refused to allow the investigation to proceed and refused to allow witnesses to be interviewed.

13. and 14. Defendants admit each and every allegation of Paragraphs 13 and 14 of the Complaint.

15. Defendants deny each and every allegation of Paragraph 15 of the Complaint except that Defendant Commission admits that its Pittsburgh District Director sent a letter to Robert Lewis, Esquire dated May 3, 1974.

16. Defendants admit each and every allegation of the first sentence of Paragraph 16 of the Complaint. Defendants deny each and every allegation of the second sentence of Paragraph 16 of the Complaint.

17. Defendants admit each and every allegation of Paragraph 17 of the Complaint.

18. Defendant Commission admits that its Associate General Counsel sent a letter to Robert Lewis, Esquire, dated July 12, 1974, and that such letter appears at Exhibit H of the Complaint. Defendants deny each and every other allegation of Paragraph 18 of the Complaint.

19. and 20. Defendants admit each and every allegation of Paragraphs 19 and 20 of the Complaint.

21. Defendants admit each and every allegation of the first and third sentences of Paragraph 21 of the Complaint. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second sentence of Paragraph 21 of the Complaint.

22. and 23. Defendants deny each and every allegation of Paragraphs 22 and 23 of the Complaint.

24. See previous answers 1-23.

25. Defendants admit that the Commission has a regulation numbered 1601.20, found at 29 C.F.R. § 1601.20. Defendants deny that Plaintiff has accurately set forth such regulation at Paragraph 25 of the Complaint.

26(a). Defendant Commission admits that it promulgated its regulation § 1610.17(d) in the Federal Register. It is codified at 29 C.F.R. § 1610.17(d). Defendants deny each and every other allegation of Paragraph 26(a) of the Complaint.

26(b). Defendants admit each and every allegation of Paragraph 26(b) of the Complaint.

27. Defendants deny each and every allegation of Paragraph 27 of the Complaint.

28. Defendants admit each and every allegation of Paragraph 28 of the Complaint.

29. and 30. Defendants deny each and every allegation of Paragraphs 29 and 30 of the Complaint.

31. See answers to Paragraphs 1-27.

32, 33, 34, and 35. Defendants deny each and every allegation of Paragraphs 32, 33, 34 and 35 of the Complaint.

36. See answers to Paragraphs 1-26.

37. Defendants deny each and every allegation of Paragraph 37 of the Complaint.

38. See answers to Paragraphs 1-26.

39. Defendants deny each and every allegation of Paragraph 39 of the Complaint.

40. See answers to Paragraphs 1-26 of the Complaint.

41. and 42. Defendants deny each and every allegation of Paragraphs 41 and 42 of the Complaint.

43. See answers to Paragraphs 1-26 of the Complaint.

44, 45, 46, 47, 48, and 49. Defendants deny each and every allegation of Paragraphs 44, 45, 46, 47, 48, and 49 of the Complaint.

WHEREFORE, Defendants pray that this Court deny the relief requested by Plaintiff.

Respectfully submitted,

ABNER W. SIBAL
General Counsel
CONSTANCE L. DUPRE
Associate General Counsel
Legal Counsel Division

/s/ Anthony J. De Marco
ANTHONY J. DE MARCO
Attorney for Defendants

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506
(202) 634-6460

Assistant United States Attorney
U.S. Post Office Bldg.
P.O. Box 1257
Richmond, Virginia 23210

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Answer has been forwarded to plaintiff's Counsel by first class mail, postage prepaid at the following addresses:

Roger S. Kaplan, Esq.
Jackson, Lewis, Schnitzler & Krupman
251 Madison Avenue
New York, New York 10016

Hill B. Wellford, Esq.
Hunton and Williams
P.O. Box 1535
Richmond, Virginia 23210

/s/ Anthony J. De Marco
ANTHONY J. DE MARCO
Attorney for the Defendants

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506
(202) 634-6460

Date: September 22, 1976

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
APPLICANT

vs.

JOSEPH HORNE COMPANY, a division of
Associated Dry Goods Corporation, RESPONDENT

ORDER

AND NOW, this 28th day of September, 1976, for the reasons stated in the foregoing Memorandum,

IT IS ORDERED that the respondent's motion to transfer the above-captioned action to the United States District Court for the Eastern District of Virginia, Richmond Division, be and the same is hereby granted, and that the respondent's motion to grant costs and attorney's fees be and the same is hereby denied, each party to bear its own costs of the proceedings in this court.

/s/ [Illegible]
C.D.J.

cc Counsel of Record

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 75-029-R

ASSOCIATED DRY GOODS CORPORATION, PLAINTIFF

—*v.*—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., DEFENDANTS

PLAINTIFF'S INTERROGATORIES TO DEFENDANTS

TO: Anthony J. DeMarco, Esq.
Counsel's Office
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20506

PLEASE TAKE NOTICE that pursuant to F.R. CIV. P. Rule 33 Defendants are hereby requested to serve upon Plaintiff's attorneys, Jackson, Lewis, Schnitzler & Krupman, by Roger S. Kaplan, and Hunton & Williams, by Hill B. Wellford, Jr., at their offices located at 261 Madison Avenue, New York, New York 10016, and 707 East Main Street, Richmond, Virginia 23212, respectively, answers in writing, separately and under oath, to the following interrogatories, on or before January 12, 1977.

In answering these interrogatories, furnish all information available to you, including information in the possession of your attorneys, or their investigators, and all persons acting in your behalf and not merely such information known of your own personal knowledge. If you cannot answer the interrogatories in full after exercising due diligence to secure the information, so state and answer to the extent possible, specifying your inability to answer the remainder and stating whatever

information or knowledge you have concerning the unanswered portions.

The interrogatories which follow are to be considered as continuing, and you are requested to provide, by way of supplementary answers thereto, such additional information as you or any other persons acting on your behalf may hereafter obtain which will augment or otherwise modify your answers now given to the interrogatories below. Such supplementary responses are to be filed and served upon Defendant within thirty (30) days after receipt of such information.

As used herein, the following terms shall have the meanings indicated below:

a. "Person" means natural persons, corporations, partnerships, sole proprietorships, unions, associations, federations, or any other kind of entity.

b. "Document" means any printed, typewritten, handwritten, or otherwise recorded matter of whatever character, including, but without limitation, letters, purchase orders, memoranda, telegrams, notes, catalogues, brochures, diaries, reports, calendars, inter-office communications, statements, announcements, photographs, tape recordings, motion pictures and any carbon or photographic copies of any such material if Plaintiff does not have custody or control of the original. If any document requested to be produced was but is no longer in Plaintiff's possession or control or is no longer in existence, state whether it is: (a) missing or lost, (b) destroyed, (c) transferred voluntarily or involuntarily to others and if so, to whom, or (d) otherwise disposed of; and in each instance explain the circumstances surrounding and authorization for such disposition thereof and state the approximate date thereof.

In each question wherein you are asked to "identify" a person, state with respect to such persons: (a) his name, (b) his last known home address and telephone number, (c) his business address and telephone number, (d) the name and address of his employer, and (e) his relationship to you.

As used herein, EEOC or Commission refers to the Defendant Equal Employment Opportunity Commission,

and its members, officers, agents, representatives or employees, including the individual named defendants, as indicated from the context of the interrogatory.

1. Identify all persons who have filed charges with the Pittsburgh District Office of the EEOC against the Joseph Horne Company division of Plaintiff since , 1972. For each person so identified, state:

a. The date on which that person's charge was filed.

b. The EEOC Case Number assigned to that person's charge.

c. The nature of the employment discrimination alleged in that person's charge (e.g., sex, race, national origin, etc.).

2. For each charge identified in answer to Interrogatory No. 1, state whether a case file was prepared by the EEOC pertaining to an investigation thereof.

3. For each file listed in response to Interrogatory No. 2, state the name, address, and official title of the EEOC member, officer, employee or agent having custody or control over such file.

4. For each file listed in response to Interrogatory No. 2, state:

a. Whether the file was examined at any time by any person or persons, other than a member, officer, or employee of the EEOC.

b. The identity of such person or persons, including the relationship of such person or persons to any charging party and any organizational, professional or business affiliation of person or persons.

c. The date(s) on which such examination occurred.

d. The purpose(s) asserted by the person or persons for conducting the examination(s).

e. The identity of the EEOC member, officer, or employee to whom this purpose or purposes was or were communicated, the date thereof, and

whether such communication was oral or in writing.

f. Whether the EEOC member, officer, or employee requested proof of the genuineness of the purpose or purposes asserted prior to permitting such examination, and of the person's relationship to the charging party whose file was sought to be examined.

g. Whether the person seeking to examine such file provided proof as aforesaid, and if so, a description of its nature, and whether it was oral or in writing.

h. The identity of each and every document contained in the file, and whether a table of contents exists for such file.

i. Whether each person identified in response to paragraph "b" above executed an "agreement of non-disclosure," on a form provided therefore, prior to examining a file.

(1) If not, identify the person or persons involved and the file which was examined.

(2) State the reason why an examination of the file was permitted without prior execution of the agreement.

5. Identify each file, or portion thereof (naming individual documents), listed in response to Interrogatory 4, which has been reproduced by holography, or xerography or similar means, at the request of any person other than an EEOC member, officer or employee.

a. State the date on which such reproduction was made.

b. Identify the person at whose request the reproduction was made.

c. State whether the copies made were provided to person requesting them.

6. State whether any of the files listed in response to Interrogatory No. 4 has ever been removed from the Pittsburgh District Office of the EEOC by, or at the request of a person other than a Commission member, officer or employee. If so:

a. Identify each file thus removed, and the date the removal occurred.

b. Identify the person
(1) who removed the file, and,
(2) requested such removal

c. State whether any documents were taken out of the file prior to such removal, and if so, identify them.

7. State whether the Pittsburgh District Office maintains or has maintained "EEO-1" reports, or copies thereof, filed by the Joseph Horne Company division of Plaintiff. If so:

a. State the years for which such reports are or have been maintained.

b. State whether any person has examined such reports.

c. If so:

(1) Identify the year of the report examined, and

(2) Identify the person who examined it.

8. State whether the EEOC has ever offered to transmit case file information to any person outside the agency, rather than solely in response to an express request therefor by such persons. If so:

a. Identify the persons to whom the offer was made.

b. Identify the person making the offer.

c. State the date on which the offer was made.

d. Identify the case and information so transmitted.

9. State whether the Pittsburgh District Office of the EEOC maintains a log or register for persons who examine offered files. If so:

a. Identify the District Office officer or employee responsible for maintaining this document.

b. State what information is recorded in this document.

c. The exact nature of the entries which relate to the files identified in Interrogatories Nos. 1-7.

10. State whether the Pittsburgh District Office of the EEOC at any time provided assistance to any persons presently involved in litigation against the Joseph Horne Company alleging violations of Title VII of the Civil Rights Act of 1964, as amended, by the division of Plaintiff. If so:

a. Identify the persons to whom assistance was provided (including the person's or persons' attorneys, where applicable).

b. Describe in detail the nature of the assistance provided.

c. Unless covered in answer to paragraph "b" above, state specifically whether such assistance included:

(1) Engaging in legal research

(2) Providing copies of pleadings or papers from other litigation

(3) Drafting pleadings, motions, interrogatories, or other discovery requests.

(4) Drafting briefs.

d. Identify the EEOC members, officers or employees who provided such assistance.

e. State, in each case the date or dates on which such assistance was provided.

Yours, etc.,

JACKSON, LEWIS, SCHNITZLER
& KRUPMAN
261 Madison Avenue
New York, N.Y. 10016
(212) 697-8200

By _____
ROGER S. KAPLAN
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HUNTON & WILLIAMS
707 East Main Street
Richmond, Virginia 23212
(804) 788-8200

By _____
HILL B. WELLFORD, JR.
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 75-029-R

ASSOCIATED DRY GOODS CORPORATION, PLAINTIFF

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., DEFENDANTS

DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES

1. Following is a list of all persons who have filed charges with the Pittsburgh District Office, Equal Employment Opportunity Commission, against the Joseph Horne Company, November 16th, 1971 to present. The EEOC Charge No., date of receipt of charge and nature of employment discrimination alleged is indicated.

   (1) Local 86, Amalgamated Clothing Workers—TPI4-0478—December 2, 1973—sex.

   (2) John Novak—034-50563-2—December 10, 1974—national origin—file destroyed—October 22, 1975.

   (3) Jean Paslowski—TPI2-0512—February 9, 1972—file destroyed—August 5, 1975.

   (4) Service Employees International Union Local 29—034-60952-2—February 13, 1976—race—Black.

   (5) Ronald Sudduth—034-50468-6—November 7, 1974—race—Black.

   (6) Joyce Gray—034-50862-2—March 25, 1975—race and sex.

(7) Demetre Geronymo—TPI3-0137—September 1, 1972—national origin.

(8) Philip R. Williams—TPI2-0555—December 4, 1974—race—Black.

(9) Mary Kritko—034-60078-3—July 24, 1975—sex and Section 704a Retaliation.

(10) Alice Corvino—TPI3-0774—May 2, 1973—sex.

(11) Marsue Dingley—TPI3-0836—June 6, 1973—sex.

(12) Katherine Murray—TPI2-0454—November 16, 1971—race—Black.

(13) Lois Blake—TPI2-0324—February 15, 1972—sex.

(14) Mary Kritko—TPI2-0484—January 17, 1972—sex.

(15) Marlene Denk—TPI2-0562—February 28, 1972—sex.

(16) Helen Pollock—TPI2-0323—January 3, 1972—sex.

(17) Mary C. Smith—034-50753-7—February 18, 1975—Section 704a Retaliation.

(18) Mary C. Smith—TPI2-0984—June 29, 1972—sex.

(19) Howard E. Watts, Jr.—TPI3-0007—July 11, 1972—sex and Section 704a Retaliation.

(20) Carol R. DiMaio—TPI2-0983—July 15, 1972—sex and Section 704a Retaliation.

2. Case files have been either completely or partially prepared for all charges identified in answer to interrogatory No. 1. Two of those files have been destroyed, as indicated, pursuant to Commission policy regarding disposal of files which have been administratively closed.

3. Each file listed above which is in existance is in the custody of Eugene V. Nelson, District Director, 2038A Federal Building, Pittsburgh, Pennsylvania 15222.

4. The use of EEOC Form 167, "Agreement of Non-Disclosure", was put into effect by the Pittsburgh District Office in June 1975 subsequent to receipt of that form in the Pittsburgh office from Headquarters. Prior to June of 1975 Charging Party counsel and Respondent counsel were given access to their client's files without signing such agreements. The following consists of answers to interrogatories 4(a) through 4(g):

   (1) TPI4-0478—File has not been examined.

   (2) 034-50563—File has not been examined.

   (3) TPI2-0512—File has not been examined.

   (4) 034-60952-2—File has not been examined.

   (5) 034-50468-6—File has not been examined.

   (6) 034-50862-2—File has not been examined.

   (7) TPI3-0137—File was examined on April 8th, 1975 by James R. Williams, Esq., Jackson, Lewis, Schnitzler and Krupman. File was also examined by Robert Lewis, Esq., Jackson, Lewis, Schnitzler and Krupman on March 25th, 1975. Copies from the file were reproduced and mailed to Mr. Williams on April 5th, May 22nd, and May 28th, 1975. Copies of relevant documents from file were also mailed to Charging Party counsel George Retos, Jr. pursuant to written request of December 4th, 1974. This written request also requested Notice of Right to Sue which was issued on December 6th, 1974. Mr. Retos stated in his letter of December 4th that he had been retained by Mr. Demetre Geronymo to commence action against Respondents named in the charge.

   (8) TPI5-0555—File has not been examined.

   (9) 034-60078-3—File has not been examined.

(10) TPI3-0774—File was examined on July 8th, 1976 by Diane Kathleen Rembelshe, Jackson, Lewis, Schnitzler and Krupman. Copies from the file were mailed to Roger S. Kaplan, Jackson, Lewis, Schnitzler and Krupman on September 1st, 1976 pursuant to written request of July 14th, 1976 under the Freedom of Information Act. File was examined by Samuel A. Vitaro, Esq., Charging Party attorney, on March 10th, 1976. Mr. Vitaro asserted that he was Charging Party attorney and completed EEOC Form 167, agreement of Non-Disclosure. Copies from the file were Xeroxed and sent to Mr. Vitaro.

(11) TPI3-0836

(13) TPI2-0324

(14) TPI2-0484

(15) TPI2-0562

(16) TPI2-0323

These files (11, 13, 14, 15, 16) were examined prior to June 1975 by Robert Lewis, Esq. and Victor Schachter, Esq., Jackson, Lewis, Schnitzler and Krupman. Copies from the files were mailed to Roger S. Kaplan, Jackson, Lewis, Schnitzler and Krupman on September 1st, 1976 pursuant to written request of July 14th, 1976 under the Freedom of Information Act. Copies from the Blake file (TPI2-0324) were mailed to Victor Schachter, Esq., on April 9th, 1975. These files were also examined by Samuel Vitaro, Esq., approximately the date he examined the Corvino (TPI3-0774) file. Mr. Vitaro indicated that these Charging Parties (other than Corvino) were referred to him by their former counsel, Louis Kushner, Esq. Copies of charges and affidavits of Pollock, Denk, Blake and Kritko (TPI2-0484) as well as seniority list of company security depart-

ment from the Kritko (TPI2-0484) file were Xeroxed and sent to Mr. Vitaro.

(12) TPI2-0454 (Murray)—File was examined prior to June 1975 by Robert Lewis, Esq., Jackson, Lewis, Schnitzler and Krupman.

(17) 034-50753-7—File has not been examined.

(18) TPI2-0984

(19) TPI3-0007

(20) TPI2-0983

These files were examined by Joel Finger, Esq., Jackson, Lewis, Schnitzler and Krupman on August 14th, 1975. He executed an EEOC Form 167. Requested copies from these files were mailed to Mr. Finger on August 21st, 1975. These files were also examined by Edward B. Friedman, Esq., Friedman and Friedman, counsel to Charging Parties, in May 1975. Notices of Right to Sue were issued to Charging Parties upon Mr. Friedman's request on June 5th, 1975. Copies of requested documents from these files were sent to Mr. Friedman on approximately this date. Copies of the Requests for Notice of Right to Sue regarding these charges from Edward B. Friedman and copies of the Smith, Watts and DiMaio charges were sent to Robert Lewis, Esq., Jackson, Lewis, Schnitzler and Krupman on July 2nd, 1975 in response to his request for copies of these documents.

h. As to those files for which Notices of Right to Sue have been issued, the files have already been examined by Plaintiff's counsel as indicated above. As to all other files Section 83 Commission Compliance Manual prohibits disclosure of these files. See also 5 U.S.C. Section 552(b)(7), law enforcement exception to Freedom of Information Act.

i. See answers to 4(a) through 4(g) above.

5. See responses to No. 4 above. Additionally, it is Commission policy to disclose to the charging party,

under § 83 of the Compliance Manual, all information in the case file except:

a) inter or intra-agency memoranda, if any;

b) conciliation materials, if any;

c) affirmative action plans from OFCCP, if any;

d) statements of confidential witnesses (such as aggrieved persons on whose behalf third persons filed charges), if any;

e) data involving other respondents, if any.

Respondent counsel, after a Title VII suit has been filed, may see the same information disclosed to charging party. Prior to implementation of § 83, charging party was not allowed to view copies of EEO-1 reports prior to institution of litigation. Except in unusual circumstances (such as when a party requests in writing that certain file be photo copied) no records are kept as to documents photo-copied.

6. Those files have not been removed from the Pittsburgh District Office by or at the request of a person other than a Commission member, officer or employee.

7. The Pittsburgh District Office maintains EEO-1 Reports filed by the Joseph Horne Company.

   a. 1970, 1971, 1972, 1973, 1974.

   b. Yes

   c. (1 and 2)—It is known that the 1974 EEO-1 Report was examined by Samuel Vitaro, Esq., and it is known that the 1970 and 1971 EEO-1 Reports were examined by Edward B. Friedman, Esq. Furthermore it is possible that those counsel have also examined EEO-1 Reports of other years.

8. No.

9. None is maintained.

10. (a, b & c)—Assistance was provided Friedman and Friedman, counsel to Watts, Smith and DiMaio in response to requests for copies of model pleadings,

complaints and interrogatories, which were provided to them. Furthermore source material was recommended to Friedman and Friedman regarding Title VII litigation. On a number of occasions this office has responded to requests for information from Friedman and Friedman concerning recent Title VII decisions. In response to questions on two or three occasions a very small amount of legal research may have been done consisting of finding and making copies of relevant decisions.

Model complaint was sent to George Retos, counsel to Demetre Geronymo, TPI3-0137. On a few occasions certain questions regarding Title VII case law have been answered in response to requests from Mr. Retos and Mr. Vitaro.

At no time were pleadings or briefs drafted by a member of the Pittsburgh District Office staff.

d. James S. Bukes, District Counsel.

e. It is impossible to ascertain the dates on which such assistance was provided.

Respectfully submitted,

ABNER W. SIBAL
General Counsel

ISSIE L. JENKINS
Deputy General Counsel

CONSTANCE L. DUPRE
Associate General Counsel
Legal Counsel Division

/s/ Anthony J. De Marco
ANTHONY J. DE MARCO
Attorney for the Defendant

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506

DATED: February 1, 1977

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA)
) SS
COUNTY OF ALLEGHENY)

Before me, the undersigned authority, personally appeared Eugene V. Nelson, who being duly sworn according to law deposes and says that he is Pittsburgh District Director, Equal Employment Opportunity Commission, Defendant, and that the within answers to Plaintiff's Interrogatories are true and correct to the best of his knowledge, information and belief.

/s/ Eugene V. Nelson
EUGENE V. NELSON

SWORN TO and subscribed before me this 18th day of January, 1977.

[SEAL]

/s/ Richard D. Cercone
RICHARD D. CERCONE
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 76-0510-R

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

JOSEPH HORNE COMPANY

ORDER

It appearing that this case was transferred from the United States District Court for the Western District of Pennsylvania on the courts own motion; and

It further appearing that the questions of law and fact are similar to the case styled *Associated Dry Goods* v. *E.E.O.C., et al.*, CA 75-0297-R; and

It further appearing that the United States District Court for the Western District of Pennsylvania transferred this case for the purpose of consolidating it with CA 75-0297-R; and deeming it proper to do so

It is hereby ORDERED that this case be and the same hereby is consolidated with CA 75-0297-R.

Let the Clerk send copies of this order to all counsel of record in CA 76-0510-R and CA 75-0297-R.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date: Mar. 1, 1977

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

BEFORE ME, the undersigned authority, a Notary Public in and for said Commonwealth and County, personally appeared SAMUEL A. VITARO, who, being duly sworn according to law, deposes and says that:

1. On March 1, 1976 Affiant was authorized by Louis B. Kushner, Esquire, to review the Equal Employment Opportunity files related to charges of sex discrimination filed by Marlene Denk, Mary Kritko, Lois J. Blake and Helen A. Pollock, against Joseph Horne Company. Louis B. Kushner at the time of authorization was the attorney for the above listed charging parties.

2. On March 10, 1976, April 14, 1976, April 27, 1976, and June 17, 1976, the Affiant reviewed the files of Marlene Denk, Mary Kritko, Lois J. Blake and Helen A. Pollock pursuant to the authorization granted by Louis B. Kushner. The review was conducted at the offices of the Equal Employment Opportunity Commission, Pittsburgh District Office, Room 2038, Federal Building, Pittsburgh, Pennsylvania 15222.

3. At the times of the above described reviews, Affiant also reviewed the Equal Employment Opportunity files of his client, Alice M. Corvino, who had filed a charge of sex discrimination against Joseph Horne Company.

/s/ Samuel A. Vitaro
SAMUEL A. VITARO

Subscribed and Sworn to before me this 23d day of March, 1977.

/s/ [Illegible]
Notary Public

UNITED STATES GOVERNMENT

Memorandum

TO : File 034-30774 DATE: June 22, 1976
Corvino v. Joseph Horne Co.

FROM : Eugene V. Nelson—/s/ E.V.N.
District Director

SUBJECT: Continuation of Processing

It is my determination that it is in the public interest that the above charge continue to be investigated, although Notice of Right to Sue was issued this date, pursuant to Commission Regulations, Section 1601.25b(d).

[EMBLEM]

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 75-0297-R

ASSOCIATED DRY GOODS CORPORATION, PLAINTIFF

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., DEFENDANTS

—and—

Civil Action No. 76-0510-R

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PLAINTIFF

v.

JOSEPH HORNE COMPANY, DEFENDANT

ORDER

For the reasons stated in the memorandum of the Court this day filed, and deeming it proper so to do, it is ADJUDGED and ORDERED that:

1. The EEOC's application filed in Civil Action No. 76-0510-R for enforcement of its administrative subpoena *duces tecum* be, and the same is hereby, granted;
2. Judgment on the merits in Civil Action No. 75-0297-R be, and the same is hereby, entered in favor of the plaintiff Associated Dry Goods Corporation;
3. The EEOC procedural regulations found at 29 C.F.R. §§ 1601.20 and 1610.17(d), and the special disclosure rules found at § 83 of the EEOC Compliance Manual, are hereby declared to be void, invalid and unenforceable to the extent that they authorize the EEOC

to disclose to charging parties any information contained in EEOC investigative files; and that the Commission, its agents, employees and all others acting in its behalf be, and they are hereby, enjoined from making any such disclosures; and

4. The request of Associated Dry Goods Corporation for attorney's fees and other litigation costs incurred in defending against the EEOC's action to enforce the subpoena *duces tecum* be, and the same is hereby, denied.

Let the Clerk send copies of this order and the memorandum to all counsel of record.

/s/ Robert R. Merhige, Jr.
United States District Judge

SUPREME COURT OF THE UNITED STATES

No. 79-1068

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONERS

v.

ASSOCIATED DRY GOODS CORPORATION

ORDER ALLOWING CERTIORARI

Filed March 17, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

Mr. Justice Powell took no part in the consideration or decision of this petition.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 320962 329

Supreme Court, U. S.
FILED
FEB 19 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1068

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

ASSOCIATED DRY GOODS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

ROGER S. KAPLAN
Counsel for Respondent
261 Madison Avenue
New York, New York 10016

Of Counsel:

JACKSON, LEWIS, SCHNITZLER
& KRUPMAN
261 Madison Avenue
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H. Kessler & Co. v. Equal Employment Opportunity Commission, 472 F.2d 1147 (5th Cir.) (en banc) (aff'g in part and rev'g in part 53 F.R.D. 330 (N.D. Ga. 1971), aff'd, 468 F.2d 25 (1972)), cert. denied, 412 U.S. 939 (1973) 8, 8n, 9, 9n, 10n, 11

Sears, Roebuck & Co. v. Equal Employment Opportunity Commission, 189 U.S. App. D.C. 163, 581 F.2d 941 (1978) 9, 9n, 10, 11

Statutes and Regulations:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1068

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

ASSOCIATED DRY GOODS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

ASSOCIATED DRY GOODS CORPORATION submits this brief in opposition to the Petition for a Writ of Certiorari filed by the Solicitor General on behalf of the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

Opinions Below

The opinion of the court of appeals (App. A, 1a-13a)[1] is reported at 607 F.2d 1075. The opinion of the district court (App. D., 16a-32a) is reported at 454 F. Supp. 387. An earlier opinion of the district court, ruling upon the Com-

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[1] References contained in parentheses are to the Petition, and to the texts of the opinions and orders below, as well as to applicable statutes, regulations and excerpts from the EEOC Compliance Manual reproduced in the Petition and its Appendices.

mission's motion to dismiss Associated's suit, is reported at 419 F. Supp. 814.[2]

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition (Pet., 2).

Statutes and Regulations Involved

The pertinent provisions of Title VII of the Civil Rights Act of 1964, as amended (Sections 706(b) and 709(e), 42 U.S.C. §§2000e-5(b), 2000e-8(e)), and of the EEOC's procedural regulations (Sections 1601.22 and 1610.17(d), 29 C.F.R. §§1601.22, 1610.17(d)), are set forth in the Petition (at 2-4).[3] Section 83 of the EEOC Compliance Manual, providing instructions to agency personnel for the disclosure of information in Commission case files, has also been reproduced (App. E, 33a-46a).[4]

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[2] A memorandum and order of the district court for the Western District of Pennsylvania in E.E.O.C. v. Joseph Horne Co., a division of Associated Dry Goods Corporation, C.A. No. 76-707 (September 28, 1976), transferring to the Eastern District of Virginia a companion proceeding brought by the Commission to enforce its administrative subpoena, is not officially reported, but is unofficially reported at 13 FEP Cases 892.

[3] Section 1601.22 supersedes former section 1601.20, which was in effect at the time this suit arose. 29 C.F.R. §1601.20 (1975). The old provision is quoted in the district court's opinion (App. D, 19a n.2).

[4] Section 83 has been amended from time to time during the course of these proceedings, but remains substantially unchanged. Appendix E to the Petition contains the present provisions (App. E, 33a-46a).

Question Presented

Whether disclosure to a charging party or other person outside the Government of employment discrimination charges made against an employer and information acquired by the EEOC during the investigation of such charges violates §§706(b) and 709(e) of Title VII.

Statement of Supplemental Facts

Associated supplements the Statement of Facts contained in the Petition (at 4-9) to more clearly describe the circumstances under which this case arose.

From 1971 through 1973 several employees and former employees of Joseph Horne Company, a division of Associated, filed charges of employment discrimination against the Company (App. D, 17a). All but one of these charges alleged sex discrimination. In February and April, 1974, the EEOC began investigating the charges by serving interrogatories on Horne's (*Id.*). These interrogatories sought a wide range of information on Horne's business and employment practices, not limited to the situations of the individual charging parties. 419 F. Supp. at 817.

Horne's refused to answer the interrogatories without assurances from the EEOC that the information sought would not be disclosed to the charging parties, their counsel or others (App. A, 3a; App. D, 17a).[5] The Company's

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[5] Contrary to the suggestion in the Petition (at 7), the Company's concern was not merely with disclosure to "the [immediate] Charging parties, their counsel, or persons interviewed during the Commission's investigation." Its request to the EEOC stated:

> Prior to making relevant information available to you, we would like written assurances that the information contained in the records you seek will not be disclosed to the charging

reluctance stemmed from a Commission employee's transmittal of the February, 1974, interrogatory—containing the names of all the charging parties and their case numbers, and questions from which the nature of their charges could be inferred—to an attorney for one or more[6] of the charging parties. 419 F. Supp. at 817.

The EEOC could not offer these assurances (App. D, 17a). On the contrary, it stated that its policy was to disclose to charging parties not only their own case files (including information provided by the employer in response to EEOC interrogatories), but "related case files," as well—those involving the same employer which were compiled during investigation of similar charges filed by other individuals (*Id.*; App. E, 43a). The only restriction placed on disclosure of materials in these files by the EEOC was that the charging party use the information in connection with pending or "contemplated litigation" and (subsequent to June, 1975) agree in writing not to make the information public except in the normal course of a civil action or other proceeding under Title VII (*Id.*; App. E, 38a). The EEOC conceded, however, that it had "no way of preventing charging parties from transmitting information" to others (App. D, 17a-18a).[7]

> parties, their counsel, or persons whom you interview during your investigation. Moreover, in the event you are unable to give us satisfactory assurances, we would like to be advised concerning the safeguards you provide which will preclude said persons from in turn transmitting this information to others. (Joint App., Fourth Cir. Nos. 78-1695, 1696, at 31).

[6] The attorney, moreover, represented some local labor unions with whom Horne's had collective bargaining agreements. 13 FEP Cases at 892.

[7] In June, 1976, one of the charging parties whose charge was involved in the interrogatories commenced a Title VII action against Horne's alleging that the Company had engaged in sex discrimination against women as a class. Prior to filing suit, the

The parties were unable to resolve their differences and, after the EEOC subpoenaed the records in dispute, this litigation followed. As recalled in the Petition (at 8), Associated prevailed in its action to invalidate the EEOC's disclosure rules and enjoin their use, but the Commission obtained enforcement of its administrative subpoena against Horne's.

GROUNDS FOR DENYING REVIEW

I.

The EEOC Seeks Review of an Issue Not Presented to the Courts Below.

The Commission characterizes the question to be reviewed as:

> Whether Sections 706(b) and 709(e) of Title VII . . . prohibit the Equal Employment Opportunity Commission, prior to the institution of a suit, from disclosing information obtained during its investigation of a charge *to the parties immediately involved in the charge.*

(Pet., at 2) (emphasis added). This issue was not presented to the courts below.

As the opinions of the district court and court of appeals make clear, the question below was whether the Commis-

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plaintiff's attorneys were permitted access to her EEOC case file and to the files of other employees who had filed sex discrimination charges against Hornes. Although the EEOC disclosed this information, it evidently never sought a written agreement of nondisclosure prior to permitting counsel to examine the files of other employees, for it could not provide the date on which the examination was made. (Joint App., Fourth Cir. Nos. 78-1695, 1696, at 158-159).

sion's regulations (now §§1601.22 and 1610.17(d)) and special disclosure rules (EEOC Compliance Manual, Section 83), in their entirety, are contrary to the restrictions on disclosure imposed by Sections 706(b) and 709(e) of Title VII (App. A, 3a; App. D, 19a-21a).[8]

Section 1601.22 purports to exclude from the confidentiality requirements of sections 706(b) and 709(e) of Title VII "such earlier disclosures to charging parties, or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief." (Pet., 3-4).[9] Section 1610.17(d) affirmatively makes the Commission's special disclosure rules applicable to "charging parties. . . ." (Pet., 4). Neither of these regulations is limited "to the parties immediately involved in the charge." [10]

The special disclosure rules even more clearly depict the gulf which separates the issue raised from the issue decided. They permit charging parties who are potential litigants

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[8] The issue presented by the EEOC in the court of appeals was: "Whether the disclosure to *a charging party* before litigation of *investigative material relevant to the charge* is making the information public in violation of Sections 706(b) and 709(e) . . ." (Brief for the EEOC, Fourth Cir. No. 78-1696, at 1) (emphasis added). The expression, "a charging party," is significantly broader than the limited term, "the parties immediately involved in the charge," and, when considered together with the reference to "investigative material relevant to the charge" (as "relevance" is defined by the EEOC), clearly refers to the expansive disclosure policy at issue in the courts below.

[9] Former section 1601.20 excluded "such earlier disclosures to the charging party, the respondent, [or] witnesses . . . as may be appropriate or necessary to the carrying out of the Commission's functions under the Title. . . ." (App. D, 19a n.2).

[10] The EEOC also construes former section 1601.20 as having "authorized disclosure to the immediate parties [and] witnesses . . . ." (Pet., 7 n.2). This view is similarly unsupported by the language of the regulation.

> access to information in other case files involving the same respondent which are available in the same District Office or Office of Systemic Programs, provided that the information in the other case files is relevant or material to the private litigant's case.

(EEOC Compliance Manual, §83.7(c)(1), App. E, 43a). Relevance and materiality are generally established "when other case files contain charges, investigations or determinations involving the same basis (e.g., sex, religion, national origin, race) . . . ." (*Id.*). Persons other than parties or their attorneys presumably may also benefit from this early disclosure (*Id.*, §83.5, App. E, 36a).

In the courts below, the EEOC sought to uphold the regulations and special disclosure rules in their entirety. Indeed, even here the Commission maintains without qualification, "[t]his petition presents the question of the validity of these disclosure provisions." (Pet., 6). If that is the EEOC's intention, the Commission has not framed its question properly.[11]

The Petition is inappropriate.

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[11] In his concurring and dissenting opinion in the court of appeals, Judge Hall expressed the view that although the EEOC's rules permitting a charging party to inspect the files of other charging parties prior to a suit involving those files violated Title VII, the rules authorizing the inspection of the charging party's own file were permissible (Pet., 9a, n.2). It is not clear whether the EEOC is now advocating the position taken by Judge Hall. Even if it were, however, we would not agree that the issue of disclosure to "immediate" parties is appropriate for review. In light of the Commission's concession that it has "no way of preventing charging parties from transmitting information" they obtain from their own files to others, the issue is an illusory one. The only appropriate question is the one considered below: whether the broad disclosure authorized by the Commission in its regulations and Compliance Manual violates Title VII.

II.

The Uniform Authority of Recent Circuit Decisions Rejects the EEOC's Disclosure Rules.

The primary argument which the EEOC makes in support of its Petition is that there is "an irreconcilable conflict among the circuits." (Pet., 9).

The only appellate decision holding in favor of the EEOC on the issue of early disclosure was rendered seven years ago in *H. Kessler & Co.* v. *E.E.O.C.*, 472 F.2d 1147 (5th Cir.) (en banc), *cert. denied*, 412 U.S. 939 (1973). Although the decision does exclude immediate charging parties (and their counsel) from the definition of "public" in §§706(b) and 709(e) of Title VII, *Kessler*, at bottom, did not turn upon an analysis of statutory language. Recognizing that only "slender wisps of legislative history" supported its holding, the Fifth Circuit ultimately was persuaded by a policy argument: "that the charging party literally needs all the help he can get in order to procure counsel, convince him that a right of action truly exists with evidence to support it, and prepare and file suit within the statutory period." 472 F. 2d at 1150, 1151.

The decision in *Kessler*, however, was not unanimous. Four judges dissented. They cited the absence of legislative support for the court's decision and, even more significantly, the majority's disregard for a countervailing policy requiring "the preservation of that spirit of voluntary and cooperative disclosure so necessary to obtain unlitigated compliance . . . ." *Id.*, at 1152, 1153.[12]

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[12] The district court in *Kessler* (53 F.R.D. 330 (N.D. Ga. 1971)) and a panel of the Fifth Circuit (468 F.2d 25 (1972)) had reached a conclusion consistent with the dissenting opinions en banc.

Prior to 1979, the two circuits other than the Fifth which had considered the Commission's disclosure practices had agreed with the dissenting views in *Kessler*. *Sears, Roebuck & Co.* v. *E.E.O.C.*, 189 U.S. App. D.C. 163, 581 F.2d 941 (1978), and *Burlington Northern, Inc.* v. *E.E.O.C.*, 582 F.2d 1097 (7th Cir.), *cert. denied*, 440 U.S. 930 (1979).[13] The decision below draws the Fourth Circuit to their standard. These courts, unlike the Fifth Circuit, have had the benefit of considering Section 83 of the EEOC Compliance Manual, as well as the 1972 amendments to Title VII which now "[give] the private Title VII litigant adequate means of prosecuting the litigation." *Sears, Roebuck & Co., supra*, 581 F.2d at 947-948 (footnote omitted).[14]

Since the rationale of *Kessler* has been eclipsed by subsequent legislation, agency rules and interpretations, this Court should refrain from reviewing the issue presented by the EEOC at least until the Fifth Circuit has had an opportunity to reconsider its holding. The conflict in the circuits is more apparent than real.

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[13] The EEOC seeks to distinguish *Sears, Roebuck & Co.* and *Burlington Northern* from the instant case on the ground, *inter alia*, that they "involved the additional issue of whether Section 709(e) prohibits disclosure to the named plaintiffs in actual or threatened class actions comprehending employees allegedly discriminated against." (Pet., 11 n.3). Far from being a ground for distinction, this may be a basis of similarity. See n. 7, *supra* p. 4.

[14] Although the 1972 amendments to Title VII had already taken effect at the time the Fifth Circuit passed upon *Kessler* en banc, the court did not refer to the pertinent amendments in its decision.

III.

This Court Previously Has Declined to Review the Issue Presented by the EEOC.

The issue sought to be reviewed by the Commission is not unfamiliar to the Court. A substantially similar question was raised by the Government in its petition for certiorari in *Burlington Northern, supra* (No. 78-946, petition filed December 12, 1978, reported at 47 U.S.L.W. 3512-3513 (1979)). This Court denied review. 440 U.S. 930 (1979).

No reason appears warranting a different result here. The same alleged conflict in the circuits on which the Solicitor General relies now was present a year ago. Furthermore, the Fourth Circuit's brief opinion in the main simply adopts the rationale of *Burlington Northern* and *Sears, Roebuck & Co., supra* (App. A, 6a). Thus, the legal issues have not been substantially refined by virtue of the present case.[15]

A writ of certiorari would be inappropriate in these circumstances.

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[15] We note, too, that this Court denied certiorari in *Kessler, supra.*

IV.

The Decision Below Is Correct and Does Not Impose a Substantial Hardship on the Commission.

The Government argues that the restrictions on the publication of charges and investigative data contained in Title VII apply only to dissemination to members of the public other than charging parties and employers, and, therefore, the courts below decided this case incorrectly (Pet., 11-12). A similar argument, based on the "scant legislative history" of the Act and the reasoning in *Kessler,* 472 F.2d at 1150, 1151, has been received coolly. *Sears, Roebuck & Co.* v. *E.E.O.C.,* 581 F.2d at 945-946, 948 n.9; *Burlington Northern, Inc.* v. *E.E.O.C.,* 582 F.2d at 1099, 1100-1101. The same welcome awaited it in Richmond (App. A, 6a; App. D, 22a-25a). We think the decisions below were proper for the reasons expressed in *Sears, Roebuck & Co.* and *Burlington Northern.*

The Government's contention that the issue it presents is of substantial importance (Pet., 13-15) is based on a constricted reading of decisions adverse to its position. None of the recent courts of appeals decisions seek to shackle the EEOC in the performance of its statutory duties. They contemplate that some information must be communicated to parties and witnesses in the course of an investigation in order to obtain corroboration (See, e.g., App. D, 6a). That is a far cry, however, from asserting, as the Solicitor General does here, that the large amounts of confidential business or personal information contained in EEOC investigative files should be made public. Since the recent decisions of the courts permit the Commission to perform its investigative functions, the concern voiced by the Solicitor General is unfounded.

The Petition should be denied.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

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No. 79-1068

In the Supreme Court of the United States

OCTOBER TERM, 1979

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ASSOCIATED DRY GOODS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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Contrary to respondent's suggestion (Br. in Opp. 8-9), *H. Kessler & Co.* v. *EEOC*, 472 F. 2d 1147 (5th Cir.) (en banc), cert. denied, 412 U.S. 939 (1973), which respondent concedes is in direct conflict with the decision below, continues to have full force and effect. Although *Kessler* was decided under the 1964 Act, there were no substantive changes in Sections 706(b) and 709(e) of Title VII (42 U.S.C. 2000e-5(b) and 2000e-8(e)) or in any amendments to the Act to suggest that Congress intended a change in the scope of the ban on publicizing (see Pet. 13 n.4).

Respondent argues (Br. in Opp. 9) that *Kessler* has been eclipsed by the 1972 amendments to Title VII, which purportedly "now" give a private plaintiff " 'adequate means of prosecuting the litigation.' " This is apparently a reference to the provisions in the statute for court-appointed counsel and for the award of reasonable

attorney's fees to successful private plaintiffs. See *Sears, Roebuck & Co.* v. *EEOC*, 581 F. 2d 941, 947-948 (D.C. Cir. 1978). Both of these provisions, however, were in Title VII as originally enacted in 1964 and were unaffected by the 1972 amendments. See Sections 706(e), 706(k), Pub. L. No. 88-352, 78 Stat. 260-261 (now codified in 42 U.S.C. 2000e-5(f)(1), 5(k)).[1]

Respectfully submitted.

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Solicitor General

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MARCH 1980

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[1]Respondent is incorrect in stating that the *Kessler* decision is predicated on policy grounds. Rather, as the opinion reflects, although supported by policy considerations, the decision is primarily based on an extensive analysis of the statutory language and on the full legislative history concerning Title VII's disclosure prohibitions. See *H. Kessler & Co.* v. *EEOC*, *supra*, 472 F. 2d at 1150-1151.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–13a) is reported at 607 F.2d 1075. The opinion of the district court (Pet. App. 16a–32a) is reported at 454 F. Supp. 387.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15a) was entered on October 10, 1979. The petition for a writ of certiorari, which was filed on January 7, 1980,

was granted on March 17, 1980 (App. 113). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether Sections 706(b) and 709(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–5(b) and 2000e–8(e), prohibit the Equal Employment Opportunity Commission from disclosing, prior to the institution of suit, information obtained during its investigation of a charge to the parties immediately involved in the charge.

STATUTES AND REGULATIONS INVOLVED

Section 706(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–5(b), provides in pertinent part:

> Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. * * * If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. * * *

Section 709(e) of Title VII, 42 U.S.C. 2000e–8(e), provides:

> It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

Section 1601.22 of the Equal Employment Opportunity Commission regulations, 29 C.F.R. 1601.22, provides:

> Neither a charge, nor information obtained pursuant to section 709(a) of Title VII, nor information obtained from records required to be kept or reports required to be filed pursuant to section 709(c) and (d) of Title VII, shall be made matters of public information by the Commission prior to the institution of any proceedings under this Title involving such charge or information. This provision does not apply to such earlier disclosures to charging parties, or their attorneys, respondents or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief. This provision also does not apply to such earlier disclosures to representatives of interested Federal, State, and local authorities as may be appropriate or necessary to the carrying out of the Commission's function under Title VII, nor to the publication of data derived from such information in a form which does not reveal the identity of

charging parties, respondents, or persons supplying the information.

Section 1610.17(d) of the Commission's regulations, 29 C.F.R. 1610.17(d), provides:

> Special disclosure rules apply to the case files for charging parties, aggrieved persons on whose behalf a charge has been filed, and entities against whom charges have been filed. The special disclosure rules are available in the public reading areas of the Commission. Under sections 706 and 709, case files involved in the administrative process of the Commission are not available to the public.

Disclosure provisions of the EEOC Compliance Manual are set forth in the appendix to the petition (Pet. App. 33a–46a).

STATEMENT

A. Statutory and Administrative Background

Congress enacted Title VII of the Civil Rights Act of 1964 with the bold purpose of removing employment discrimination from the fabric of our national life. See Section 701 *et seq.* of Title VII, 42 U.S.C. 2000e *et seq.* Congress identified and declared unlawful certain discriminatory employment practices (Sections 703 and 704 of Title VII, 42 U.S.C. 2000e–2, 2000e–3), and created the Equal Employment Opportunity Commission ("Commission") as the principal enforcement agency in this area. Sections 705(a) and 706(a) of Title VII, 42 U.S.C. 2000e–4(a), 2000e–5(a). While Congress provided for the enforcement of the law by designing an interlocking system of administrative and judicial processes, the filing of a complaint with the

Commission[1] is a condition precedent to securing relief under Title VII. Sections 706 and 707 of Title VII, 42 U.S.C. 2000e-5, 2000e-6. Cf. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

Once a charge has been filed, the Commission must undertake an investigation to determine whether the charge has merit: "Whenever a charge is filed * * * alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training * * * programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place, and circumstances of the alleged unlawful employment practice) on such [person] * * * within ten days, and shall make an investigation thereof." Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b). The statute further provides that "[c]harges shall not be made public by the Commission." *Ibid.*

If the Commission determines after investigation that there is reasonable cause to believe that the charge is true, it must attempt to eliminate the discrimination through "informal methods of conference, conciliation, and persuasion." *Ibid.* Title VII likewise provides that "[n]othing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as

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[1] When an adequate state or local remedy exists, the charge must first be filed with state or local officials. Section 706(c) of Title VII, 42 U.S.C. 2000e-5(c); *Love* v. *Pullman Co.*, 404 U.S. 522 (1972). A charge may be filed with the Commission 60 days thereafter. Section 706(c) of Title VII, 42 U.S.C. 2000e-5(c).

evidence in a subsequent proceeding without the written consent of the persons concerned." *Ibid.* It is unlawful for "any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its [investigative and recordkeeping] authority * * * prior to the institution of any proceeding under this subchapter involving such information." Section 709(e) of Title VII, 42 U.S.C. 2000e-8(e). Sections 706(b) and 709(e) both authorize the imposition of criminal penalties, including imprisonment for not more than one year, against Commission personnel who violate these provisions. 42 U.S.C. 2000e-5(b), 2000e-8(e).

Since 1965, the Commission has consistently construed Sections 706(b) and 709(e), the "public disclosure" provisions of Title VII, to permit limited pre-litigation[2] disclosure of investigatory materials to charging parties, respondents, and witnesses, where

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[2]The Commission regularly discloses factual materials to the parties during investigation and conciliation proceedings. On occasion, it is also necessary to disclose certain facts to material witnesses (see pages 21, 28-29, *infra*). Because a charging party may bring suit in federal district court even without a Commission determination that reasonable cause exists (Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1)), the Commission has also always permitted a charging party to review the Commission's file concerning his charge, with confidential material deleted, but only if he has filed—or contemplates filing—a civil action, and only if he executes a non-disclosure agreement. Prior to 1975, the Commission made such files available in these circumstances as a matter of practice. In 1975, the Commission codified that practice. See 29 C.F.R. 1610.17(d), 40 Fed. Reg. 8171 (1975); EEOC Compliance Manual § 83 (Pet. App. 33a). Normally, the charging party is not permitted access to his file until the expiration of the 180-day period during which the Commission has exclusive jurisdiction under Section 706(f)(1) of

such disclosure is deemed necessary or appropriate to the Commission's administration of the statute. On July 1, 1965, the Commission first published its construction of these provisions (30 Fed. Reg. 8409 (1965)):

> Neither a charge, nor information obtained pursuant to Section 709(a) of Title VII, nor information obtained from records required to be kept or reports required to be filed pursuant to Sections 709(c) and (d) of said Title, shall be made matters of public information by the Commission prior to the institution under the title of a court proceeding involving such charge or information. This provision does not apply to such earlier disclosures to the charging party, the respondent, witnesses, and representatives of interested Federal, State, and local agencies as may be appropriate or necessary to the carrying out of the Commission's functions under the Title, nor to the publication of data derived from such information in a form

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Title VII, 42 U.S.C. 2000e-5(f)(1). EEOC Compliance Manual § 83 (Pet. App. 33a). Cf. 29 C.F.R. 1601.28 (a)(2). Charging parties are also permitted access, during administrative proceedings, to relevant information that may be contained in files concerning substantially similar charges against the same respondent. EEOC Compliance Manual § 83.7(c) (Pet. App. 43a). When substantially similar charges against the same respondent are filed contemporaneously, the Commission frequently consolidates them for investigatory purposes. In other circumstances, the Commission may rely in a later investigation on statistical data and other factual information accumulated in an earlier investigation of the same respondent. In those circumstances, it is necessary to provide a charging party with access to materials contained in other files because his own file will not contain all the information that is relevant to his case. In no circumstances, however, is the identity of any other charging party disclosed. EEOC Compliance Manual § 83.7(c) (3), (4) (Pet. App. 44a-45a). See pages 30-32, 36-43, *infra*.

> which does not reveal the identity of the charging party, respondent, or person supplying the information.

Although this rule has been amended in two minor respects since 1965,[3] the Commission's interpretation of the statute[4] has been consistent throughout this fifteen-year period, and the current rule (pages 3–4, *supra*) is identical in all material respects to that which the Commission promulgated in 1965.

As soon as a charge has been filed, the Commission must undertake an investigation and determine whether there is reasonable cause to believe that an unlawful employment practice has occurred. Section 706(b) of Title VII, 42 U.S.C. 2000e–5(b). In 1977, the Commission adopted a new investigative procedure. See 29 C.F.R. 1601.15, 42 Fed. Reg. 55388 (1977).[5] This procedure, which the Commission designed to

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[3] In 1971, the reference to "a court proceeding" was changed to "any proceedings." See 36 Fed. Reg. 20600 (1971). In 1977, the Commission amended the rule to provide that materials could be disclosed to the parties' attorneys as well as to the parties themselves. See 42 Fed. Reg. 47836 (1977). The 1977 amendment simply conformed the language of the rule to the Commission's longstanding practice (see App. 32–33).

[4] The Commission's long-standing interpretation of the statute is also reflected in its own memoranda (App. 32–[redacted]) and those of its general counsel (App. 32–33).

[5] Most current charges contain narrowly drawn allegations of discrimination and are processed through the "Rapid Charge Processing System." See *Hearings on Reorganization Plan No. 1 of 1978 Before the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 118, 132 (1978) ("Senate Reorganization Hearings"); EEOC Compliance Manual § 14.3(a). The Commission also identifies a small number of individual charges which it believes may form the basis of a Commission class action. Those charges are processed separately through the "Early Litigation

expedite its handling of charges, provides for the scheduling of a fact-finding conference with the parties early in the investigation, and well before the making of a reasonable cause determination. The fact-finding conference, which provides both parties with an opportunity to present their versions of the facts, is "primarily an investigative forum intended to define the issues, determine which elements are undisputed, to resolve those issues that can be resolved, and to ascertain whether there is a basis for negotiated settlement of the charge." *Ibid.*

The institution of fact-finding conferences, which are predicated upon early dissemination of factual information to both parties, has greatly increased the Commission's efficiency in settling disputes without resort to the judicial process. Whereas only 14% of the charges filed with the Commission resulted in settlement prior to 1977, the Commission currently settles 44% of its charges through conciliation. *Oversight*

Identification Program." See *Oversight Hearings on Federal Enforcement of EEOC Laws Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 96th Cong., 1st Sess. 61–63 (1979) ("1979 Oversight Hearings"). EEOC Compliance Manual § 12. As of July 1979, only 200 charges had been designated for processing through the latter program. See 1979 Oversight Hearings 63. A third system is used for processing charges alleging systemwide discrimination, which charges are typically filed by a member of the Commission. *Id.* at 59–61; EEOC Compliance Manual §§ 12.1(b), 16. Only narrowly-drawn individual charges were filed by the charging parties here. In *Burlington Northern, Inc.* v. *EEOC*, 582 F. 2d 1097 (7th Cir. 1978), cert. denied, 440 U.S. 930 (1979), and *Sears, Roebuck & Co.* v. *EEOC*, 581 F.2d 941 (D.C. Cir. 1978), by contrast, the investigatory files had been compiled pursuant to a Commissioner's charge of systemwide discrimination. See page 32, note 19, *infra*.

Hearings on Federal Enforcement of EEO Laws, Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 96th Cong., 1st Sess. 40, 68, 86 (1979) ("1979 Oversight Hearings"). Previously, aggrieved parties routinely waited two or three years to have their charges processed. See *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 363–364 (1977). The average time for processing a charge has been reduced to about two months. 1979 Oversight Hearings 40.

If the fact-finding conference does not result in settlement, the Commission, consistent with its practice since 1965, provides the parties with a determination memorandum which reports the Commission's reasonable cause conclusion and fully describes and evaluates the evidence that it has received. See 29 C.F.R. 1601.21; EEOC Compliance Manual § 40. See also 30 Fed. Reg. 8408–8409 (1965).[6]

B. Associated's Complaint

The Joseph Horne Company ("Horne") is a division of Associated Dry Goods Corporation ("Associated")

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[6]Prior to 1972, Commission investigators also prepared detailed factual findings that were distributed to the parties before the Commission made its "reasonable cause" determination. The parties were then afforded an opportunity to object to the findings and provide additional evidence before the Commission made its determination. See 30 Fed. Reg. 8408 (1965). That procedure was abandoned in 1972 because it contributed to unnecessary delays. See 37 Fed. Reg. 20165 (1972). Since 1977, however, the parties have been afforded a substantially equivalent opportunity to confront the facts and correct the record at oral conferences. See 29 C.F.R. 1601.15, 42 Fed. Reg. 55388 (1977).

and operates several retail department stores in the Pittsburgh, Pennsylvania metropolitan area. Between November 1971 and June 1973, seven Horne employees filed employment discrimination charges with the Commission's Pittsburgh district office (App. 78–84). Six of the charges were filed by women who alleged sex discrimination in promotions, wages, and conditions of employment (App. 79–84). The seventh charge was filed by a black woman, whose employment had been terminated, and who alleged racial discrimination in promotions, wages, and conditions of employment (App. 78). Three of the charging parties also alleged that Horne had retaliated against them for having previously complained to the Commission (App. 79, 82, 84).

In February 1974, the Commission's Pittsburgh office began its investigation by asking Horne to provide certain relevant information, including the charging parties' employment records. Horne stated that it would not provide any information unless the Commission agreed in advance that it would not disclose any such information to the charging parties, to their attorneys, or to any witnesses interviewed during the investigation (App. 26). In accordance with regularly established policy, the director of the Commission's Pittsburgh office declined to provide that assurance. The district director explained that while all investigative materials are not routinely provided to a charging party, the Commission sometimes finds it necessary to discuss portions of such materials with the charging party when the Commission analyzes the factual background of a case (App. 27). The district director also explained that the Commission's rules permit the

charging party, subject to certain conditions, to examine a redacted version of his case file if he contemplates the filing of a civil action (App. 27).

On October 18, 1974, when it had become obvious that Horne intended to persist in its refusal to cooperate, the Commission issued a subpoena in aid of its investigation (App. 38–39). On October 23, 1974, Horne petitioned the Commission for revocation of the subpoena (App. 44–47). That petition was denied on May 9, 1975 (App. 48–54). On June 27, 1975, Associated brought this action[7] in the United States District Court for the Eastern District of Virginia, seeking a declaration that the Commission's disclosure policies were unlawful and an injunction prohibiting the enforcement of the Commission's subpoena (App. 5–16).[8] Associated rested its claim that the Commission's regulations and policies are unlawful on the ground that Sections 706(b) and 709(e) of Title VII, 42 U.S.C. 2000e–5(b) and 2000e–8(e), categorically preclude the Commission from making any pre-litigation disclosure of investigatory information to any person outside the

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[7] Associated alleged that the court had jurisdiction under the Freedom of Information Act, 5 U.S.C. 552; the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, 701 *et seq.*; 28 U.S.C. 1331, 1337, 1651; the Declaratory Judgment Act, 28 U.S.C. 2201–2203; Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*; and the Trade Secrets Act, 18 U.S.C. 1905 (App. 6).

[8] The Commission subsequently brought suit to enforce its subpoena in the United States District Court for the Western District of Pennsylvania. That action was transferred and consolidated with Associated's action in the Eastern District of Virginia (App.92). The district court enforced the subpoena (Pet. App. 25a–31a), and the court of appeals affirmed (Pet. App. 3a–4a). Associated did not petition for further review of that issue.

government, including the parties to the dispute that the Commission is attempting to conciliate.

C. The District Court's Decision

Rejecting the Commission's long-standing interpretation of its organic law, the district court held that Title VII precludes the Commission from disclosing any information to the parties at any time prior to the filing of a lawsuit. The district court based its holding on the District of Columbia Circuit's construction of the "public disclosure" provisions in *Sears, Roebuck & Co.* v. *EEOC*, 581 F.2d 941 (D.C. Cir. 1978), in which that court held that those provisions prohibited the Commission from providing individual charging parties with information generated in a system-wide investigation which resulted from the filing of a Commissioner's charge (see pages 8–9, note 5, *supra*). Quoting from *Sears*, the district court held (Pet. App. 22a):

> "An examination of the overall statutory scheme persuades us that Title VII was never meant to permit dissemination of EEOC investigative data to anyone not within the government.
>
> * * * It would do violence to the scheme of negotiation and settlement if the Commission were permitted to encourage numerous private litigants by distributing information from EEOC files before the administrative procedures of Title VII had run their course."

The district court also relied on the District of Columbia Circuit's assertion that the Commission "had no effective means of controlling the manner in which charging parties used information which they obtained from the Commission's files" (Pet. App. 22a–23a).

Thus, the district court entered judgment declaring

the Commission's "procedural regulations found at 29 C.F.R. §§1601.20 and 1610.17(d), and the special disclosure rules found at §83 of the EEOC Compliance Manual * * * to be void, invalid and unenforceable to the extent that they authorize the EEOC to disclose to charging parties any information contained in EEOC investigative files" (App. 111–112). The court also enjoined "the Commission, its agents, employees and all others acting in its behalf * * * from making any such disclosures" (App. 112).

D. The Court of Appeals' Decision

The court of appeals affirmed by divided vote, holding that the "public disclosure" provisions "prohibit EEOC from disclosing investigative materials to the parties prior to suit" (Pet. App. 7a). The court declined to discuss all but one of the Commission's substantive arguments[9] on the ground that those arguments had been thoroughly analyzed, albeit with varying results, by three other circuits (Pet. App. 6a). See *Burlington Northern, Inc.* v. *EEOC*, 582 F.2d 1097 (7th Cir. 1978), cert. denied, 440 U.S. 930 (1979); *Sears, Roebuck & Co.* v. *EEOC*, 581 F.2d 941 (D.C. Cir. 1978); *H. Kessler & Co.* v. *EEOC*, 472 F.2d 1147 (5th Cir.) (en banc), cert. denied, 412 U.S. 939 (1973). The court considered and rejected the Commission's argument that Congress could not have intended to prohibit all pre-litigation disclosure because such a pro-

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[9]The court of appeals also discussed and rejected (Pet. App. 6a–7a) the Commission's contention that the court's previous decision in *Charlotte-Mecklenburg Hospital Authority* v. *Perry*, 571 F.2d 195 (4th Cir. 1978), supported the Commission's position.

hibition would emasculate the Commission's investigatory and conciliation processes, and thereby defeat major purposes of the statute. The court stated (Pet. App. 6a):

> EEOC contends that a decision prohibiting EEOC from disclosure will unduly restrict it in conducting an investigation as, for example, when EEOC seeks corroboration from the individuals concerned of information supplied by their employer that their qualifications for the position to which they were promoted or for which they were hired were superior to those of the charging party who was not promoted or hired. We think that such corroboration may easily be obtained without violating the statutory restrictions by interrogating those employees on the basis that "it has been said" or "it has been reported" without providing them with letter and verse of the employer's contentions or the specific identity of the representative of the employer advancing the contention.

In dissent, Judge Hall observed that the Commission's long-standing policy of permitting limited disclosure to parties contemplating the filing of lawsuits "discourage[s] meritless litigation, by informing potential litigants of the weakness of their cases, and * * * meritorious suits which may be encouraged by the rules complement, rather than hinder, [the Commission's] own enforcement efforts" (Pet. App. 10a–11a).[10] Judge Hall maintained (Pet. App. 13a):

> The majority's invalidation of the rules will force the individual to file an action, and then learn

[10]Judge Hall noted that he would uphold the Commission's rules insofar as they permit a charging party to inspect his own case file; he would not allow a charging party to have access to other employees' case files (Pet. App. 9a n.2).

through discovery whether he has a meritorious case. I fail to see how this will promote any of the statute's objectives.

SUMMARY OF ARGUMENT

Congress based the enforcement mechanism of Title VII on the premise that it is neither necessary nor desirable for all employment discrimination claims to be resolved in the federal courts. Because Congress recognized that many claims could be resolved without resort to litigation, it provided that parties aggrieved by discrimination could bring suit in federal court only after the Commission had had some opportunity to investigate and attempt to settle the dispute "by informal methods of conference, conciliation and persuasion." Section 706(b) of Title VII, 42 U.S.C. 2000e–5(b). Since the Commission's inception in 1965, conciliation has been a major cornerstone of its enforcement processes, and countless employment discrimination cases have been diverted from an already overburdened judicial system. By invalidating a critical element of the Commission's investigatory and conciliation procedures, the court of appeals has cast serious doubt on the Commission's continued ability to settle discrimination complaints without recourse to the federal courts.

At issue here is the proper construction of the two "public disclosure" prohibitions contained in Title VII. Sections 706(b) and 709(e) of that Title both prohibit the Commission and its employees from "making public," prior to the institution of federal court litigation, any information gathered in the course of an investiga-

tion. Once litigation has been commenced, that prohibition no longer applies.

Since 1965, the Commission has consistently construed these provisions of its organic law to permit limited pre-litigation disclosures of investigative materials to the immediate parties and, in more limited circumstances, to witnesses whose knowledge is necessary to an investigation. That construction, which is entitled to substantial deference, has a substantial basis in the language and legislative history of Title VII and is essential to the effectiveness of the Commission's investigatory and conciliation processes. From the very outset, the Commission has recognized that parties to a conciliation must understand the strengths and weaknesses of their respective cases if conciliation is to be something more than a meaningless formality. When conciliation efforts are successful, the parties necessarily waive their rights to have their claims and defenses adjudicated in a federal court. Common sense, as well as the language and legislative history of the statute, demonstrate that Congress could not have expected that the parties would waive those rights in ignorance. Moreover, the success of the Commission's investigatory and conciliation efforts often depends upon its ability to confront witnesses with certain factual allegations.

Frivolous as well as meritorious charges are more likely to be settled at the conciliation stage if the parties have a realistic view of the facts. Indeed, the court of appeals seriously erred in assuming that the Commission's practice of disseminating information to the parties encourages non-meritorious lawsuits. If a

charging party must file a lawsuit merely to secure the information necessary to evaluate his case, more non-meritorious lawsuits will be filed. Even if it were true that non-disclosure would discourage litigants from filing suit, however, there is no reason to believe that frivolous—rather than meritorious—lawsuits would thereby be weeded out. The decision below simply makes access to the facts depend upon a charging party's ability to sustain the financial burdens attendant upon civil litigation. There is no inherent correlation between the merits of a person's grievance and his ability to pay for legal services. The decision below would greatly impair the effectiveness of the Commission's investigatory and conciliation processes and the important statutory purposes that they serve.

ARGUMENT

I. THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF TITLE VII SHOW THAT CONGRESS DID NOT INTEND TO PROHIBIT THE COMMISSION FROM DISCLOSING INFORMATION TO PERSONS DIRECTLY INVOLVED IN THE INVESTIGATION

Sections 706(b) and 709(e) provide for the imposition of criminal penalties against Commission personnel who "make public" information obtained in the course of receiving, investigating and conciliating charges of employment discrimination. Section 706(b) provides that "[c]harges shall not be made public" and that "[n]othing said or done during and as a part of * * * [conciliation] endeavors may be made public * * * without the written consent of the persons concerned." 42 U.S.C. 2000e–5(b). Section 709(e) makes it unlawful, unless litigation has been commenced, for Com-

mission personnel "to make public in any manner whatever any information obtained by the Commission" pursuant to its investigative authority. 42 U.S.C. 2000e-8(e). The question at issue is straightforward: whether Congress intended to include the charging party, the respondent and material witnesses, despite their unique relationship to the dispute, within the statutory "public," to whom no investigatory materials may be disclosed unless litigation has been initiated.

The answer to that question appears on the face of the statute. While Title VII does not purport to define the term "public,"[11] its meaning is clear from the context in which it first appears in the statute: "Charges

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[11] The plain meaning of the term, however, encompasses only those persons who have no particularized interest in the dispute. The legislative development of the Freedom of Information Act, 5 U.S.C. 552, is instructive. Prior to 1966, the public disclosure section of the Administrative Procedure Act provided that even matters of official record could be made available only to "persons properly and directly concerned" with the information (5 U.S.C. (1964 ed.) 1002). In 1966, Congress enacted the Freedom of Information Act which, by contrast, provides that information shall be made available to "the public" (5 U.S.C. 552). This Court noted in *EPA* v. *Mink*, 410 U.S. 73, 79 (1973), that "[t]he Act eliminates the 'properly and directly concerned' test of access, stating repeatedly that official information shall be made available 'to the public,' 'for public inspection.' " Indeed, this Court has repeatedly held that the Information Act affords no special consideration to persons who may indeed have a particularized interest in disclosure. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975); *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 22 (1974). See also *Miers* v. *Brownlow*, 21 F.2d 376, 378 (S.D. Ala. 1927) (statute excluding the "public" from an immigration hearing held not to apply to an immigrant's attorney, but only to "those who attend out of curiosity").

shall not be made public by the Commission." Section 706(b) of Title VII, 42 U.S.C. 2000e–5(b). If this provision were construed to prohibit dissemination of charges to a "public" that encompassed the charging party and the respondent, it would have no meaning. The substance of a charge cannot be concealed from the charging party, who is the author of the charge. Likewise, the statute requires that the respondent be given notice of the charge within ten days after it has been filed.[12] It would make no sense, therefore, to make the respondent part of the "public" from whom the Commission must withhold the allegations contained in the charge. Section 706(b) further provides that matters occurring during conciliation may not be "made public * * * without the written consent of the persons concerned." This provision also demonstrates that Congress did not intend to include the immediate parties within its definition of the "public" to whom

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[12] Since 1972, Section 706(b) of Title VII, 42 U.S.C. 2000e–5(b), has provided that "the Commission shall serve a notice of the charge (including the date, place and circumstance of the alleged unlawful employment practice) on such employer * * * within ten days." Prior to 1972, this provision was contained in Section 706(a) of Title VII, 42 U.S.C. (1970 ed.) 2000e–5(a), which required the Commission to "furnish such employer * * * with a copy of such charge * * * provided that such charge shall not be made public by the Commission." 78 Stat. 259. The legislative history of the 1972 amendments suggests that Congress inserted this change to permit the Commission to protect from disclosure the identity of the charging party, when necessary to further the aims of the statute. 118 Cong. Rec. 4941 (1972). Cf. *Chromcraft Corp.* v. *EEOC*, 465 F.2d 745, 748 (5th Cir. 1972). In general, the Commission has continued its practice of serving the respondent with a copy of the charge. See 29 C.F.R. 1601.14; EEOC Compliance Manual §§ 10.1, 10.2.

disclosure is prohibited. The very concept of conciliation assumes that the parties to the process will be privy to what is said and done during conciliation negotiations, including such matters as proposals or rejections of settlement offers and counter-offers. The contrary view is simply illogical, as the Fifth Circuit recognized in *H. Kessler & Co.* v. *EEOC*, *supra*, 472 F.2d at 1151: "It would indeed be anomalous if the parties, whose written permission is required in order to publicize what was 'said or done,' would themselves have been considered by Congress to be members of the 'public' to whom disclosure is prohibited."

Moreover, Section 706(b) does not simply instruct the Commission to interview the parties, but requires that an "investigation" be conducted. Charges of employment discrimination are frequently accompanied by intense feelings, and evidence supplied by disinterested witnesses is often more reliable than accusations offered by the parties themselves. Yet, as Senator Humphrey recognized in the debates preceding the enactment of Title VII (see pages 23–24, *infra*), witness interviews are a two-way street: information must sometimes be disclosed to secure other information. Where interviews are conducted for the purpose of corroborating or refuting the parties' factual assertions, those assertions must sometimes be disclosed to the witness. Moreover, witnesses may frequently be called upon to authenticate documentary evidence, in which case disclosure of the document involved is essential. Because the statute requires that the Commission investigate charges, and it is often impossible to conduct a meaningful investigation without disclosing

some information to some witnesses, the plain language of the statute permits limited disclosures to witnesses.

In short, Section 706(b) could not be read consistently and as a whole if its reference to the "public" did not exclude parties directly involved in the administrative proceeding. It is likewise clear that Congress could not have intended to use the same language to convey a different meaning in Section 709(e) of Title VII, 42 U.S.C. 2000e–8(e): "If such had been [Congress'] intent, it seems as though it would have expressed itself in different language, and not by a phrase so suggestive, from past use, of a more limited purpose." *Marks* v. *United States*, 161 U.S. 297, 303 (1896). As the Fifth Circuit said in *H. Kessler & Co.* v. *EEOC*, *supra*, 472 F.2d at 1151 (footnote omitted), "[t]hese two sections treat of essentially the same subject matter, i.e., the powers and duties of the Commission in following up a charge of employment discrimination, and, thus, absent any clear indication in the statutes to the contrary, we think they should be read in a manner consistent with one another."

While the legislative history of the "public disclosure" provisions is somewhat sparse, it unequivocally supports the view that Congress did not intend to preclude dissemination of information to the parties or to material witnesses. The "public disclosure" provisions were not part of the bill originally passed by the House,[13] but were inserted as part of the Senate substitute bill that was sponsored by Senators Dirksen

[13]The original House bill had provided only that "[n]othing said or done during and as a part of such endeavors may be used

and Humphrey and became law when passed without amendment in the House. See 110 Cong. Rec. 12819 (1964). Senator Humphrey clearly explained that the purpose of the "public disclosure" provisions was to prevent wide dissemination of unproved charges of discrimination, not to prevent the Commission from making necessary disclosures to persons who had either a particularized interest in the charge or knowledge of facts that were essential to the Commission's investigation. Senator Humphrey said (110 Cong. Rec. 12723 (1964) (emphasis added)):

> [*T*]*his is a ban on publicizing and not on such disclosure as is necessary to the carrying out of the Commission's duties under the statute.* Obviously, the proper conduct of an investigation would ordinarily require that the witnesses be informed that a charge had been filed and often that certain evidence had been received. Such disclosure would be proper. The amendment is not intended to hamper Commission investigations or proper cooperation with other State and Federal

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as evidence in a subsequent proceeding." H.R. Rep. No. 88-914, 88th Cong., 1st Sess. 12 (1963). Senator Dirksen proposed that "made public" be inserted in this provision. 110 Cong. Rec. 8192 (1964). It should also be noted that the House bill, while not containing a subsection specifically prohibiting the disclosure of investigative information, did incorporate the provisions of Section 10 of the Federal Trade Commission Act, 15 U.S.C. 50, which prohibits Commission employees from making "public any information obtained from the Commission without its approval." That Section prohibits only those disclosures that have not been authorized by the Commission. 16 C.F.R. 4.10(c). Moreover, the FTC rules provide for disclosure of materials to the parties. 16 C.F.R. 3.36. The purpose of the House provision was likewise limited to prohibiting "unauthorized" disclosures. See 110 Cong. Rec. 7214 (1964).

> agencies, but rather is aimed at the making available to *the general public* of unproven charges.

Senator Humphrey realistically recognized that an effective investigation could not be carried out unless the Commission were able to discuss its understanding of the parties' factual assertions with witnesses from whom the Commission might seek corroboration or refutation of those assertions. If disclosures to mere witnesses are "ordinarily require[d]," disclosures to the parties are clearly essential.

That Congress intended to distinguish between disclosures to the general public and disclosures to persons necessarily involved in the investigation is further evidenced by Senator Dirksen's remarks. As part of a package of amendments, some of which were later incorporated in the substitute bill that was enacted, Senator Dirksen proposed that conciliation discussions not be "made public." 110 Cong. Rec. 8193 (1964). (See pages 22–23, note 13, *supra*.) He explained (110 Cong. Rec. 8193 (1964)):

> The maximum results from the voluntary approach will be achieved if the investigation and conciliation are carried on in privacy. If voluntary compliance with this title is not achieved, the dispute will be fully exposed to public view when a court suit is filed.

Clearly, Senator Dirksen's concern was also limited to "publicizing."

In sum, the statutory language and its legislative history[14] both demonstrate that Congress did not in-

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[14] Senator Dirksen also discussed the "public disclosure" provisions in a memorandum which sets forth the differences be-

tend to prohibit the Commission from disclosing information to the parties when Congress enacted the "public disclosure" provisions of Title VII.

II. THE COMMISSION'S CONSISTENT INTERPRETATION OF ITS STATUTE SINCE 1965, AND CONGRESS' ACQUIESCENCE IN THAT INTERPRETATION, FURTHER DEMONSTRATE THAT CONGRESS DID NOT INTEND TO PROHIBIT THE COMMISSION FROM DISCLOSING INFORMATION TO PERSONS DIRECTLY INVOLVED IN THE ADMINISTRATIVE PROCEEDING

Shortly after the Commission was established in 1965, it adopted regulations interpreting Sections 706(b) (then 706(a)) and 709(e) to permit "disclosures to the charging party, the respondent, witnesses, and representatives of interested Federal, State or local agencies as may be appropriate or necessary to the carrying out of the Commission's functions under the Title." 30 Fed. Reg. 8407 (1965). In the past fifteen years, the Commission has not varied from that contemporaneous construction of its statute, and Congress has never indicated that that construction does not comport with its legislative intent.

No principle of administrative law is more fundamental than that which requires deference to be given to the contemporaneous construction of a statute by those whom Congress has "'charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are

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tween the bill which had originally passed the House and the Senate substitute. See 110 Cong. Rec. 12819 (1964). His explanation of the "public disclosure" provisions simply tracks the statutory language. *Ibid.* There is no further legislative history concerning these provisions.

yet untried and new.'" *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408 (1961). As this Court said in *FCC* v. *Schreiber*, 381 U.S. 279, 290 (1965), "administrative agencies and administrators * * * will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved." Accord *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 524–525 (1978); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433–434 (1971); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). Those principles apply with special force where, as here, the area of regulation is itself unique.

An agency's contemporaneous construction of its organic statute is entitled to particular deference when it has withstood the test of time. See *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972). It is now fifteen years since the Commission first promulgated its construction of the "public disclosure" provisions of Title VII. The Commission has consistently adhered to that construction throughout the intervening years, and Congress has never indicated its disapproval. In 1972, Congress exhaustively reconsidered and substantially amended certain provisions of Title VII, but it made no material changes in either of the "public disclosure" provisions.[15] This Court has often held that "the silence of Congress in

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[15] In 1972, Congress amended Section 706(b) by substituting "persons concerned" in place of "the parties" in the provision requiring consent prior to the disclosure of conciliation materials. The legislative history contains no evidence that any substantive change was intended. Indeed, the conference report continues, despite the change, to state that Section 706 condi-

the face of the long continued [executive] practice * * * must be considered as 'equivalent to consent to continue the practice until the power [is] revoked by some subsequent action by Congress.'" *United States* v. *Jackson*, 280 U.S. 183, 196–197 (1930). Accord *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978); *Chemehuevi Tribe* v. *FPC*, 420 U.S. 395, 409–410 (1975); *Farmers Union* v. *WDAY*, 360 U.S. 525, 532–533 (1959); *Costanzo* v. *Tillinghast*, 287 U.S. 341, 345 (1932). See also 2A C. Sands, *Sutherland on Statutory Construction* §49.09 (4th ed. 1973).

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tions disclosure upon "the consent of the parties." S. Rep. No. 92–681, 92d Cong., 2d Sess. 16 (1972). It should be noted, however, that Congress also amended Section 706(b) to permit charges to be filed "on behalf of" an aggrieved person, without disclosure of his identity, and it may well be that Congress adopted the phrase "persons concerned" to conform to that change. See 118 Cong. Rec. 4941 (1972).

Section 709(e) was not amended in 1972. However, the Senate bill had proposed renumbering Section 709(e) as Section 709(f) and inserting a new Section 709(e), which would have prohibited the Commission from "disclos[ing] any record or paper" required to be kept by the statute, except to Congress, government agencies, or in proceedings before a court or grand jury. S. Rep. No. 92–415, 92d Cong., 1st Sess. 67 (1971); 118 Cong. Rec. 4943 (1972). The section was deleted in conference without explanation. Although this action may be equivocal, it cannot be inferred that Congress thought the proposed section unnecessary on the ground that the existing provision already contained that restriction. Such an inference would have been baseless in light of the Commission's published regulations. But see *Sears, Roebuck & Co.* v. *EEOC*, *supra*, 581 F.2d at 948 n.9. The only reasonable inference to be drawn is that Congress determined that the statutorily required records deserved no greater protection than that afforded to other information in the Commission's possession. See *H. Kessler & Co.* v. *EEOC*, *supra*, 472 F.2d at 1150–1151; cf. *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 17 (1953).

In these circumstances, it must be assumed that Congress has approved the agency's construction.

III. THE COMMISSION'S ABILITY TO DISCLOSE INFORMATION TO THE PARTIES AND TO MATERIAL WITNESSES DURING THE ADMINISTRATIVE PROCESS IS ESSENTIAL TO THE PERFORMANCE OF ITS STATUTORY FUNCTION TO INVESTIGATE, MAKE A DETERMINATION AS TO REASONABLE CAUSE, AND CONCILIATE CHARGES OF DISCRIMINATION

Senator Humphrey, one of the chief architects of Title VII, recognized more than sixteen years ago that some information would have to be disclosed to parties and witnesses if the Commission were to perform its statutory functions. The Commission's fifteen years' experience in administering Title VII has confirmed the validity of that prediction.

Commission investigations perform three functions: (1) to provide the Commission with an adequate factual basis for determining whether there is reasonable cause to believe that a charge is true; (2) to provide an adequate factual basis for holding meaningful settlement discussions with the parties; and (3) to provide an adequate factual basis for determining whether litigation should be commenced if conciliation fails. Because the purpose of Commission investigations is to produce an accurate account of the relevant facts upon which to base agency action, it is essential that Commission investigators be able to confront the parties with their adversaries' evidence. Unless the parties are allowed to answer or refute such evidence, the Commission's investigative results will necessarily be suspect. Moreover, to the extent that corroboration or refutation by disinterested witnesses is likely to be

more reliable than statements made by the parties themselves, it is inevitable that a proper investigation may sometimes require disclosure of evidence and, in some cases, the existence of the charge, to such witnesses.

1. *Investigation.*

The Commission's current investigatory procedures, which were promulgated in 1977,[16] depend upon early and direct disclosure of information to the parties. See Senate Reorganization Hearings 81, 93–100. When a charge is made, the Commission requires that the charging party provide a detailed statement of the relevant facts. EEOC Compliance Manual § 2.3. The Commission then gives notice to the respondent, who is also sent a questionnaire requesting factual information and documents relating to the charge. EEOC Compliance Manual §§ 10, 14.4(e), 14.5(a). When the Commission receives a response from the employer, it schedules an informal fact-finding conference, in which the parties, their attorneys (who may act only as advisors), and a Commission representative meet to discuss their respective positions and determine what fac-

[16] The Commission's pre-1977 procedure proved time-consuming and ineffective. The Commission's experience since 1977 indicates that earlier disclosure of information results in a larger number of settlements and a shorter processing time. In contrast to the 14% settlement rate under the previous system, where disclosure often occurred only when the Commission decided whether reasonable cause existed, the Commission has achieved a 44% settlement rate under the new system, where both sides have been given the evidence and required to evaluate their respective cases at an early stage in the proceedings. Charges have also been processed on a greatly accelerated basis under the new system. See pages 8–10, *supra*.

tual issues are actually in dispute. *Id.* at § 14.7. The fact-finding conference is "primarily an investigative forum intended to define the issues, determine which elements are undisputed, to resolve those issues that can be resolved, and to ascertain whether there is a basis for negotiated settlement of the charge." 29 C.F.R. 1601.15(c). As the Commission's Chair has testified, the conference "gets the facts out much more quickly than months and sometimes years of shuffling papers * * * [and] makes both parties more realistic about the merits of each side and sets the stage for settlement." Senate Reorganization Hearings 81. Frequently, the Commission representative must disclose facts within the Commission's knowledge to resolve factual disputes, to enable each party to rebut the other's allegations, and to reassure each party that the other is not withholding relevant data.[17] It is the face-to-face discussion of the facts which tends to moderate positions and cause the parties to arrive at a settlement.

Substantially similar charges are often consolidated for investigation if they are filed at approximately the same time. In other instances, the Commission's investigation may draw upon information that was generated in an earlier investigation of the same employer.

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[17] Respondents have refused to attend fact-finding conferences on the basis of the decision below. While Section 710 of Title VII, 42 U.S.C. 2000e-9, authorizes the Commission to subpoena a party's attendance at such a conference, the Commission could not compel disclosure of factual information at the conference if the Fourth Circuit's construction of Section 709(e) is correct. Consequently, a recalcitrant party could make the conference a meaningless and perfunctory exercise.

Because the facts relevant to an individual's case may be contained in other case files, the Commission has construed Section 709(e) to permit disclosure to the parties of statistical and other directly relevant information obtained in a prior or concurrent investigation of substantially similar charges against the same employer. EEOC Compliance Manual § 83.7(c) (Pet. App. 43a–45a). See also *Mosley* v. *General Motors Corp.*, 10 F.E.P. Cas. 1442, 1445, 10 Empl. Prac. Dec. ¶10,380 at 5627 (E.D. Mo. 1975).[18] The reasons supporting that policy are compelling. On the one hand, it would squander the Commission's limited resources to require it to retrace its steps each time that a substantially similar charge is filed. On the other hand, it would be both unreasonable and unfair to permit the first charging party to have full access to relevant information, while limiting later charging parties to whatever information the Commission happens to have placed in their respective files. See *Burlington Northern, Inc.* v. *EEOC*, *supra*, 582 F.2d at 1101 n.9. Because the charges in this case have been consolidated for investigation, the disclosure of the materials contained in the consolidated investigation files will be as essential to the success of the administrative proc-

[18] Disclosure of such information may also occur during formal conciliation efforts or pre-litigation case file evaluation. Because the District Director is familiar with the procedures used and the cases being investigated within his jurisdiction, the Commission has delegated to him the discretion to determine what evidence is relevant and material and when such evidence should be disclosed. See EEOC Compliance Manual § 83.7(c) (Pet. App. 43a–45a). In effect, pertinent materials in other investigative files relating to the same employer are thus incorporated by reference into another investigation.

ess as is disclosure of a single investigative file in an isolated case. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804–805 (1973) (statistics and other information about an employer's general policy and practice are probative in evaluating an individual claim of discrimination).[19]

2. *The Reasonable Cause Determination and Conciliation*

If the dispute is not resolved at the fact-finding conference, the Commission continues its investigation and then begins formal conciliation efforts. When the Commission completes its investigation, it issues a determination of whether there is reasonable cause to believe that the charge is true.[20] 29 C.F.R. 1601.21.

[19] In two previous cases, the courts of appeals disagreed in some respects with the Commission's construction of the "public disclosure" provisions of Title VII. See *Burlington Northern, Inc.* v. *EEOC*, 582 F.2d 1097 (7th Cir. 1978), cert. denied, 440 U.S. 930 (1979); *Sears, Roebuck & Co.* v. *EEOC*, 581 F.2d 941 (D.C. Cir. 1978). Both of those cases involved the Commission's practice of disclosing to individual charging parties, as "pre-litigation disclosure" (see pages 36–42, *infra*), the materials generated in a system-wide investigation based on a Commissioner's charge. In neither case did the courts of appeals consider the destructive effects that their construction would have on the administrative process as a whole. While the Commission believes that the courts of appeals erred in construing the statute to preclude pre-litigation disclosure of systemwide files to individual charging parties, that issue is not presently before the Court because no Commissioner has filed a charge against Associated and no system-wide investigation has been conducted here. To the extent that Associated might seek to attack the Commission's regulations concerning dissemination of system-wide investigatory files generated in response to a Commissioner's charge, that attack would be entirely hypothetical.

[20] In most cases, the Commission attempts to obtain a

The Commission's written determination ordinarily contains a statement and evaluation of the facts and sets forth the basis for the Commission's conclusions. EEOC Compliance Manual § 40.7 Copies of the determination are given to both parties. *Id.* at § 40.11. The Commission's factual discussion serves an important function in that both parties are thereby informed of those practices that the Commission is prepared to attempt to correct through conciliation or, alternatively, through the possible filing of a Commission lawsuit. *EEOC* v. *Hearst Corp.*, 553 F.2d 579 (9th Cir. 1977); *EEOC* v. *General Electric Co.*, 532 F.2d 359, 366–371 (4th Cir. 1976). See also *General Telephone Co.* v. *EEOC*, No. 79–488 (May 12, 1980), slip op. 12. The practices thus identified may be narrower or broader than the original charge. The reasonable cause determination can serve as a spur to conciliation and settlement only if it contains a factual statement that informs both parties of the specific factual bases for the Commission's conclusion. If Section 709(e) applies to the parties, all but the most conclusory factual information must be omitted. See *Sears, Roebuck & Co.* v. *EEOC*, *supra*, 581 F.2d at 949 n.11.

"negotiated settlement" before a reasonable cause determination is issued. 29 C.F.R. 1601.20; EEOC Compliance Manual § 15. In the event that a settlement is reached in this manner, the settlement agreement specifically states that the Commission has made no judgment on the merits. *Ibid.* Before issuing a reasonable cause determination letter, the Commission also conducts a "pre-determination" interview to afford each party a final opportunity to present rebuttal evidence or indicate his willingness to settle the dispute. EEOC Compliance Manual § 27. Evidence which the Commission may use in its determination is discussed at such conferences.

The conciliation process cannot successfully resolve disputes if the Commission is categorically prohibited from disclosing relevant factual information to the parties. It is only through knowledge of the facts that the parties can assess the strengths and weaknesses of their respective positions and thus engage in meaningful settlement negotiations. As this Court said in *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 21-22 (1974), "negotiation is a bargaining process, with give and take, and with stress upon and use of the strengths of one's own position and the weaknesses of the position of the other party." The parties are not likely to reach a settlement if they have insufficient facts to analyze their respective positions. Even if the parties were able to reach a general agreement to settle the dispute, however, the terms of an agreement could not be formulated or evaluated without factual information. For example, an employer might be willing in principle to settle a case, but he would certainly not agree to pay a specific sum in back pay relief without ascertaining the extent of a former employee's interim earnings. See Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g).

That rights created by a federal statute should be enforced without requiring the aggrieved party to hire a lawyer or file a lawsuit is a somewhat novel feature of Title VII. Congress recognized that many employment discrimination claims could—and should—be settled without recourse to an already overburdened judicial system. That many aggrieved persons would be unable to bear the financial burdens routinely incurred in civil litigation clearly influenced Congress in di-

recting that the Commission attempt to resolve disputes "by informal methods of conference, conciliation, and persuasion." Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b). Unless an aggrieved person consents to the terms of a Commission-negotiated settlement, however, he retains the right to file a civil action. Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1). See *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 364 (1977); *McClain* v. *Wagner Electric Co.*, 550 F.2d 1120-1121 (8th Cir. 1977). If the charge is settled at the conciliation stage, the parties thereby waive their rights to have their dispute adjudicated by a federal court. It would be unreasonable to assume, without any basis in the legislative history, that Congress intended that either party should be required to waive that right without full awareness of the facts elicited by the Commission's investigation. Cf. *D.F. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174, 185 (1972).[21]

The Fourth Circuit's construction of the statute—which would, in comparison, compel aggrieved persons to negotiate in the dark—would not encourage prelitigation settlements. To the contrary, because Section 709(e)'s disclosure prohibition has no application after a suit has been filed, charging parties who are able to do so may feel compelled to bring suit as a dis-

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[21] That burden would fall more heavily, of course, on charging parties. Most charging parties are not represented by counsel at the conciliation stage and, unlike most respondents, they have limited resources for conducting an independent investigation. Charging parties labor under another disability at the conciliation stage in that they must not only persuade respondents that their claims have merit, but also that they are prepared to enforce those claims through litigation if necessary.

covery mechanism, solely to obtain sufficient information to determine whether they should settle. If a charging party must file suit to secure information for evaluating his case, one of the fundamental purposes of conciliation—to keep unnecessary litigation out of the federal courts—will be undermined.

3. *Pre-Litigation Case File Evaluation.*

An aggrieved person may file a civil action even if the Commission has not entered a determination of reasonable cause. Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1). While the Commission has no authority to prevent the filing of a meritless lawsuit, the facts themselves may persuade the charging party and his attorney that the case is not worth pursuing. Since 1965, the Commission has permitted charging parties to inspect their investigative files in anticipation of litigation.[22] Unless the charging party establishes a "compelling need" for the information (see *Drew* v. *Liberty Mutual Ins. Co.*, 480 F.2d 69 (5th Cir. 1973), cert. denied, 417 U.S. 935 (1974)), however, the file may not be inspected until either the 180-day period has expired or a "right to sue" letter has issued, whichever occurs first. EEOC Compliance Manual

[22] Because Section 706(b) prohibits disclosure of conciliation matters without the consent of the persons concerned, offers and counter-offers are revealed to the parties only during settlement discussions, and only to the extent necessary to conduct such discussions. Not even the parties are subsequently given access to conciliation materials. However, if any factual material—which could have been obtained in the investigation—is provided to the Commission during conciliation, that material is deemed subject to Section 709(e), not Section 706(b). See 29 C.F.R. 1601.26(b); EEOC Compliance Manual § 83.6(f) (Pet. App. 40a-41a).

§ 83.3(a) (Pet. App. 35a).[23] Confidential materials, such as statements by witnesses who have been promised anonymity and data concerning other respondents, are not disclosed. EEOC Compliance Manual § 83.6 (Pet. App. 39a–41a). Moreover, information is disclosed only if "the person requesting disclosure agree[s] in writing not to make the information obtained public except in the normal course of a civil action or other proceeding instituted under Title VII." EEOC Compliance Manual § 83.3(b) (Pet. App. 35a, 38a).[24]

Without any factual basis, the court of appeals here concluded that the Commission's disclosure policies are

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[23]The Commission may issue a "right to sue" letter before the expiration of the 180-day period if it has either dismissed the charge or completed its administrative processing of the charge prior to that time. 29 C.F.R.1601.19(f), 1601.28(b). The Commission may also issue a "right to sue" letter before the expiration of the 180-day period if "the District Director, the Area Director, the Director of the Office of Field Services or the Director of the Office of Systemic Programs has determined that it is probable that the Commission will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge and has attached a written certificate to that effect." 29 C.F.R. 1601.28(a)(2). In such cases, the Commission may permit inspection of the charging party's file before 180 days have elapsed.

[24]The district court concurred (Pet. App. 23a) in the *Sears* court's view that, " 'As there is nothing to prevent charging parties from redistributing what they receive from the EEOC to whomever they please, distribution of investigative file data to charging parties would be tantamount to distribution to the public at large.' " That view ignores the existence of the contract which charging parties are required to sign. That contract is clearly enforceable, and the Commission could protect the integrity of its procedures by bringing an action for injunctive relief and compensatory and punitive damages against any

unwise in that they allegedly undermine conciliation and propel litigants into court. That conclusion is unwarranted for several reasons. First, disclosure of information cannot make a weak case into a strong one. While a charging party may be persuasive in convincing an attorney that he has been wronged, the record will speak for itself. If counsel examines the file and makes a realistic appraisal of the facts, he is more likely to persuade his client that a weak case is not worth pursuing. If the administrative file demonstrates that the charging party's case is not worth litigating, disclosure is to the advantage of everyone, including the respondent and the court, because all may be spared the burden of unnecessary litigation. If, on the other hand, the administrative file demonstrates that the charging party's claim is strong, the aims of the statute will also be served by disclosure. See Comment, *The Meaning of "Public" In Section 709(e) of The 1964 Civil Rights Act And Access to Information Gathered By The EEOC*, 67 Ky. L.J. 430 (1978–1979).

Second, Section 709(e) clearly permits public disclo-

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party who failed to abide by the terms of the contract. See *United States* v. *Snepp*, 595 F. 2d 926, 934 (4th Cir. 1979), reversed in part and remanded, Nos. 78–1871, 79–265 (Feb. 19, 1980); *Brown* v. *Coates*, 253 F.2d 36, 39 (D.C. Cir. 1958). Moreover, as a third-party beneficiary, the respondent presumably could bring an action for damages or injunctive relief. See *Hendrick* v. *Lindsay*, 93 U.S. 143, 149 (1876); *Bossier Parish School Board* v. *Lemon*, 370 F.2d 847, 850 (5th Cir.), cert. denied, 388 U.S. 911 (1967). In fact, the Commission is not aware of a single instance in which a charging party has ever violated the agreement. Charging parties generally look to conciliation and litigation—rather than publicity— for redressing their grievances.

sure of information after litigation has been commenced. The real effect of the Fourth Circuit's holding, therefore, is to require charging parties to file civil actions to secure the facts necessary to make a reasoned evaluation of their claims. The imposition of that burden on charging parties—who are not likely to be wealthy—is warranted neither by the statute nor by considerations of judicial economy. Moreover, litigation takes on a life of its own. Once the charging party and his attorney have invested the resources necessary to the filing of a lawsuit, they may be less likely to abandon even a meritless claim. As Judge Hall noted in dissent, it is not sound policy, and it does not comport with the statutory scheme and purposes, to "force the individual to file an action, and then learn through discovery whether he has a meritorious case" (Pet. App. 13a).[25]

Third, disclosure is not likely to affect conciliation efforts because the Commission currently processes most charges within approximately sixty days. In most cases, therefore, conciliation will have succeeded or

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[25] In *Sears, Roebuck & Co.* v. *EEOC*, *supra*, the court speculated that disclosure of investigatory files might chill an employer's willingness to submit information voluntarily. Except for the present case and *Kessler*, however, there are no reported decisions in which an employer has refused to cooperate on that ground. Moreover, the employer must expect that investigatory information may be used by the Commission in any litigation brought by the Commission, and the statute clearly provides that such information may be disclosed to a private plaintiff, in any event, *after* litigation is commenced. It is not reasonable to believe that the possibility of pre-litigation disclosure to an aggrieved person would have any effect, even as a theoretical matter, on an employer's willingness to cooperate with the Commission.

failed prior to disclosure. Even if such disclosure did have any adverse impact on conciliation, however, it must be remembered that the elimination of unlawful employment practices—not conciliation—is the principal purpose of Title VII. Both private and Commission litigation in furtherance of that purpose are essential elements of Title VII enforcement.[26] While Congress empowered the Commission to bring Title VII enforcement actions in 1972, "the private right of action remains an essential means of obtaining judicial enforcement of Title VII." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974).[27] Moreover, the

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[26] In some cases, the filing of a suit may itself spur settlement of Title VII disputes. See *Young* v. *International Telephone & Telegraph Co.*, 438 F.2d 757, 764 (3d Cir. 1971); *Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1201 (1971).

[27] The Section-by-Section analysis of the 1972 amendments clearly demonstrates that private litigation remains an important part of Title VII enforcement (118 Cong. Rec. 7565 (1972)):

> The retention of the private right of action * * * is intended to make clear that an individual aggrieved by a violation of title VII should not be forced to abandon the claim merely because of a decision by the Commission or the Attorney General as the case may be, that there are insufficient grounds for the Government to file a complaint. Moreover, it is designed to make sure that the person aggrieved does not have to endure lengthy delays if the Commission or Attorney General does not act with due diligence and speed. Accordingly, * * * the person aggrieved [may] elect to pursue his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution.
>
> It is hoped that recourse to the private lawsuit will be the exception and not the rule * * * . However, as the individual's rights to redress are paramount under the provi-

private litigant retains the unique role of a "private attorney general" as "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 481 (1978), quoting *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

Moreover, it is the charging party's role as a "private attorney general" that distinguishes Title VII from laws in which agencies are solely responsible for enforcement; it is also that role which distinguishes charging parties from the public and justifies disclosure to them of the facts uncovered by the Commission's investigation, in order to enable them—and their counsel—to determine whether a suit is warranted.[28] "In order to assist the 'private attorney gen-

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sions of Title VII, it is necessary that all avenues be left open for quick and effective relief.

See also *Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 363-366; *General Telephone Co.* v. *EEOC*, *supra*, slip op. 7, 14. Because of the Commission's limited resources, it cannot sue on every individual charge, but gives first priority to "pattern and practice" cases. 1979 Oversight Hearings 75.

[28]The charging party typically approaches an attorney with only his version of the events and, perhaps, a brief statement by the Commission stating whether it believes that "the claim has sufficient merit to warrant litigation." EEOC Compliance Manual § 40.1. An attorney could not possibly make an independent evaluation of the case on the basis of this information alone. While an experienced attorney may well see merit in a case that the Commission has found deficient, he is unlikely to undertake a time-consuming factual investigation simply to make that initial determination, particularly in light of the fact that the case will probably be one in which he has to rely on a contingent fee contract or an award of attorney's fees in any event. Moreover, a hasty decision to take the case may ultimately result in an adverse fee award. See *Christiansburg Garment Co.* v. *EEOC*, *supra*, 434 U.S. at 421. While Title VII guarantees that a

eral' in fulfilling his duties, it is clearly appropriate to make available to him the resources of the government agency which is charged with the same duties." *National Electrical Contractors Association* v. *Walsh*, 15 F.E.P. Cas. 1158, 1160, 12 Empl. Prac. Dec. ¶11,116 at 5168 (D. D.C. 1976). The very fact that a charging party need not await the completion of conciliation or any other action by the Commission demonstrates that the victim's right to obtain relief is paramount. Any adverse effect on conciliation is a result of a policy judgment on the part of Congress. See *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 461 (1975).

Limited disclosure of investigatory information is essential to the Commission's fulfillment of its statutory mandate at virtually every step of the administrative process. While the court of appeals focused on only a single aspect of that process—witness interviews—it is noteworthy that even in that limited area the court was unable, in substituting its judgment for that of the Commission, to formulate a rule that would satisfy its construction of the statute as well as permit the Commission to perform its statutory functions. The court of appeals recognized the need for some disclosure when it suggested that the Commission could adequately investigate charges by prefacing factual statements to witnesses with such circumlocutions as " 'it has been said' or 'it has been reported' without providing * * * letter and verse of the em-

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charging party may seek judicial relief, even after the Commission has found no reasonable cause (*McDonnell Douglas Corp.* v. *Green*, *supra*, 411 U.S. at 798–799), that right may be illusory if the charging party's prospective attorney may not inspect the Commission's investigatory file.

ployer's contentions or the specific identity of the representative * * * advancing the contention" (Pet. App. 6a).

The court of appeals' proposal fails on two grounds. First, Section 709(e) provides that "[i]t shall be unlawful * * * to make public in any manner whatever any information obtained by the Commission." 42 U.S.C. 2000e-8(e). If parties and witnesses must indeed be considered members of the public, even the court of appeals' indirect method of disclosure would appear to be unlawful. Second, the court of appeals' proposal is clearly inadequate for accomplishing the Commission's statutory duty to investigate. For instance, the Commission may require authentication of documentary evidence, but a witness will not often be able to authenticate a document without examining it. Moreover, to reveal the contents of a document or a statement may be tantamount to disclosure of the document or statement itself. It is simply unrealistic to believe that Congress intended criminal liability to hinge on an investigator's ability to tread the fine line between disclosing information indirectly and providing "letter and verse." Most important, the court of appeals' proposal ignores common experience by assuming that sources of information are fungible. A witness or charging party may tell a story that is internally consistent and incapable of direct refutation. While that person's reputation for mendacity or history of mental illness would certainly be entitled to substantial weight in such circumstances, the court of appeals' formulation would ordinarily preclude the Commission from ascertaining such critical facts.

The court of appeals' decision, which is based on an apprehension of hypothetical abuses that have never occurred, thus fails on its own terms. More important, that decision is inconsistent with the language, legislative history and purposes of Title VII.

CONCLUSION

The judgment of the court of appeals should be reversed, except insofar as that judgment affirmed the district court's enforcement of the Commission's subpoena.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ASSOCIATED DRY GOODS CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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Emerson Electric Co. v. *Schlesinger*, 609 F.2d 898 (8th Cir. 1979) 21n
Environmental Protection Agency v. *Mink*, 410 U.S. 73 (1973) 46n

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FPC v. *Florida Power & Light Co.*, 404 U.S. 553 (1972) 46

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Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 47n

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NLRB v. *Wyman-Gordon Co.*, 397 F.2d 394 (1968), *rev'd on other grounds*, 394 U.S. 759 (1969) 16

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29 C.F.R. § 1610.17(d) 4, 9, 10
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Equal Employment Opportunity Commission Compliance Manual:

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National Labor Relations Board Casehandling Manual, Vol. 1, Unfair Labor Practice Proceedings, § 10056.1 (1975) 22n

Legislative Materials:

H.R. Rep. No. 1370, 87th Cong., 1st Sess. (1963) 17

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S. REP. No. 415, 92nd Cong., 1st Sess. (1971) 29n, 33

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S. CONF. REP. No. 681, 92nd Cong., 2d Sess. (1972) 34n

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118 CONG. REC. 3373 (1972) 34n

118 CONG. REC. 7165 (1972) 34n

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118 CONG. REC. 7563 (1972) 34n

Oversight Hearings on Equal Employment Opportunities Before the Subcommittee on Employment Opportunities, 95th Cong., 1st Sess. (1977) 33n

Secondary Sources:

Legislative History of Titles VII and XI of the Civil Rights Act of 1964 (EEOC 1965) 17, 18, 23

Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act,* 40 Geo. Wash. L. Rev. 824 (1972) 35n

Comment, *Access to EEOC Files,* 46 Univ. of Chi. L. Rev. 477 (1979) 28n, 29n, 30n, 46n

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1068

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

ASSOCIATED DRY GOODS CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

Question For Review

Whether Sections 706(b) and 709(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(b) and 2000e-8(e), prohibit the Equal Employment Opportunity Commission ("EEOC") from disclosing, prior to the institution of suit, information obtained during its investigation of a charge to the parties immediately involved in the charge.[1]

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[1] This articulation does not accurately reflect the issue here. The issue is whether the EEOC disclosure rules, which permit certain persons pre-litigation access to EEOC investigative files, conflict with section 709(e)'s ban on making public any information obtained by the EEOC during its investigations. *See* Brief for Respondent In Opposition To The Petition for a Writ of Certiorari, at 5-7. Section 706(b) does not concern investigative

Opinions Below

The opinion of the court of appeals (Pet. 1a-13a)[2] is reported at 607 F.2d 1075. The opinion of the district court (Pet. 16a-32a) is reported at 454 F. Supp. 387. An earlier opinion of the district court, denying the motion of the Equal Employment Opportunity Commission to dismiss the complaint, is reported at 419 F. Supp. 814.

Statutes and Regulations Involved

Section 709(e) of Title VII, 42 U.S.C. 2000e-8(e), provides:

> It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

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files, and the decisions below did not turn on application of this provision. *See* Amended Complaint (Joint Appendix 10-12) ("J.A.") district court opinion (Pet. 17a; 20a-22a) and court of appeals opinions (Pet. 5a; 9a, n. 2.) Furthermore, the Question's implied limitation to "the parties immediately involved in the charge" is apparently calculated to suggest much more circumscribed disclosure than that actually permitted by the EEOC disclosure rules. As will be seen, these rules cannot be harmonized with section 709(e).

[2] Citations to the Petition for a Writ of Certiorari are denominated ("Pet.").

Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b), provides in pertinent part as follows:

> Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. * * * * *
>
> If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

Section 1601.22 of the regulations of the Equal Employment Opportunity Commission, 29 C.F.R. 1601.22,[3] provides:

> Neither a charge, nor information obtained pursuant to section 709(a) of Title VII, nor information obtained from records required to be kept or reports required to be filed pursuant to section 709(c) and (d) of Title VII, shall be made matters of public information by the Commission prior to the institution of any proceedings under this Title involving such charge or

[3] This section supersedes former section 1601.20, which was in effect at the time this suit arose. 29 C.F.R. § 1601.20 (1975). The earlier provision is quoted in the district court's opinion (Pet. 19a).

> information. This provision does not apply to such earlier disclosure to charging parties or their attorneys, respondents or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief. This provision also does not apply to such earlier disclosures to representatives of interested Federal, State, and local authorities as may be appropriate or necessary to the carrying out of the Commission's function under Title VII, nor to the publication of data derived from such information in a form which does not reveal the identity of charging parties, respondents, or persons supplying the information.

Section 1610.17(d) of the regulations of the Equal Employment Opportunity Commission, 29 C.F.R. 1610.17(d), provides:

> Special disclosure rules apply to the case files for charging parties, aggrieved persons on whose behalf a charge has been filed, and entities against whom charges have been filed. The special disclosure rules are available in the public reading areas of the Commission. Under sections 706 and 709, case files involved in the administrative process of the Commission are not available to the public.

The EEOC's special disclosure rules contained in EEOC Compliance Manual § 83, are set forth in Appendix E to the Petition for a Writ of Certiorari (Pet. 33a-46a).

Counter-Statement of the Case

A. *Statutory Framework.*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, created substantive rights to end discrimination in employment. It also prescribed a carefully balanced plan of enforcement. Congress envisaged a four-step procedure, consisting of the filing of a charge, investigation, a determination by the EEOC whether reasonable cause exists to believe a violation has occurred and, if so, use of conference, conciliation, and persuasion to resolve the matter. In the event such informal means were unavailing, Congress provided for litigation as a last resort. *See generally Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 365-366 (1977).

Congress entrusted the EEOC with broad investigatory powers to obtain information from charged employers.[4] As a counterpoise, however, Congress imposed upon the EEOC an equally broad duty to preserve the confidentiality of the information gathered during its investigations. It must refrain from "mak[ing] public in any manner whatever any information" it obtains prior to suit. Section 709(e).[5]

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[4] The EEOC has the right to access, at all reasonable times, to any person or company being investigated, for the purpose of examining and copying any evidence "that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation." 42 U.S.C. § 2000e-8(e). It has subpoena power to "requir[e] the attendance and testimony of witnesses or the production of any evidence" during its investigations of charged parties. *See* 42 U.S.C. § 2000e-9, incorporating section 11 of the National Labor Relations Act, 29 U.S.C. § 161.

[5] 42 U.S.C. § 2000e-8(e). The text of this section is reprinted *supra* at 2.

Another section of Title VII, 706(b), 42 U.S.C. § 2000e-5(b), also imposes non-disclosure obligations upon the EEOC. That

In this case, the Court must decide whether the EEOC has improperly ignored this statutory prohibition.

B. *Facts and Proceedings Below.*

From 1971 through 1973 several employees and former employees of Joseph Horne Company ("Horne's"), a division of Associated Dry Goods Corporation ("Associated"), filed charges of employment discrimination against Horne's (Pet. 17a). All but one of these charges alleged sex discrimination. In February and April, 1974, the EEOC began investigating the charges by serving "interrogatories" on Horne's (Pet. 17a) (J.A. 19-21). These interrogatories sought a wide range of information concerning Horne's business and employment practices, not limited to the situations of the individual charging parties. *See* 419 F. Supp. at 817.

Horne's refused to answer the interrogatories without assurances from the EEOC that the information sought would not be disclosed to the charging parties, their counsel or others (Pet. 3a; 17a).[6] The Company's reluctance stemmed, in part, from a Commission employee's transmittal of the February, 1974 interrogatory—containing the names of all the charging parties, the case number assigned to each charge, and questions from which the nature of the charges could easily be inferred—to an attorney

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section prohibits the EEOC from making public charges filed with it or anything said or done during "informal endeavors" by the agency to resolve such charges by conference, conciliation and persuasion.

[6] Contrary to the EEOC's suggestion (EEOC Brief at 11), the Company's concern for disclosure extended beyond revelations to "the Charging parties, their attorneys, or witnesses interviewed during the investigation" to "safeguards [the Commission] provide[s] which will preclude said persons from in turn transmitting [investigative file] information to others" (J.A. 26).

for one or more of the charging parties.[7] 419 F. Supp. at 817.

The EEOC refused to offer these assurances of confidentiality (Pet. 17a). It stated that its policy was to disclose to charging parties not only their own case files (including information provided by the employer in response to EEOC interrogatories), but also "related case files,"—files involving the same employer compiled during investigations of similar charges brought by other persons (Pet. 17a; 43a). The only restriction placed on disclosure of materials in these files by the EEOC was that the requesting party agree to use the information only in connection with pending or "contemplated" litigation and (after June, 1975) agree in writing not to make the information public except in the normal course of a civil action or other proceeding under Title VII (Pet. 17a; 38a).[8] The EEOC conceded, however, that it had "no way of preventing charging parties from transmitting information" to others (Pet. 17a-18a).

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[7] The EEOC never ascertained how many charging parties this attorney represented (J.A. 70). The attorney also represented certain labor unions which had collective bargaining agreements with Horne's, *see EEOC* v. *Joseph Horne Co.*, 13 FEP Cases 892, n. 1 (W.D. Pa. 1976), and certain competitors of Horne's (J.A. 8).

[8] The EEOC does not always abide by this rule. In June, 1976, Alice M. Corvino, one of the charging parties involved in the investigation (J.A. 8), commenced a Title VII action against Horne's, alleging that the Company had engaged in sex discrimination against women as a class. *Corvino* v. *Joseph Horne Co.*, Civil Action No. 76-826 (W.D. Pa.). Prior to filing suit, Ms. Corvino's attorneys were permitted access to her EEOC case file and to the files of other employees who had filed sex discrimination charges against Horne's (J.A. 102-104). Although the EEOC disclosed this information, it evidently failed to obtain a written agreement of nondisclosure prior to permitting counsel to examine the files of other employees, for it could not provide the dates on which the examinations were made (J.A. 103-104).

Since the parties were unable to agree on confidentiality for Horne's records, Associated commenced this action for declaratory and injunctive relief against the EEOC disclosure rules (J.A. 16).

The district court held that the disclosure prohibitions of Title VII barred the EEOC from "furnish[ing] materials from its investigative files to employees contemplating private Title VII litigation against employers under investigation by the Commission." (Pet. 21a). It concluded, in agreement with the District of Columbia Circuit in *Sears, Roebuck & Co.* v. *EEOC*, 581 F.2d 941 (D.C. Cir. 1978) ("*Sears*"), that the Act "prohibited the EEOC from disclosing its investigative files to anyone outside the government, including charging parties." (Pet. 24a). The court therefore enjoined application of the EEOC disclosure rules (J.A. 111-112).

The court of appeals affirmed (Pet. 2a). Finding itself "in essential agreement with the district court" (Pet. 4a), the Fourth Circuit followed the District of Columbia and the Seventh Circuits in *Sears* and *Burlington Northern, Inc.* v. *EEOC*, 582 F.2d 1097 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979) ("*Burlington Northern*"), respectively, holding that the EEOC disclosure rules conflict with section 709(e), and impede voluntary adjustment of employment discrimination charges (Pet. 6a-7a).[9]

This Court granted *certiorari*, —— U.S. ——, 100 S.Ct. 1311 (1980).

Against this backdrop we turn to the disclosure provisions in question.

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[9] Judge Hall dissented (Pet. 7a-13a). He would have upheld the disclosure rules to the extent they authorize charging parties to see their own files. Like the majority, however, he believed that "permit[ting] the charging party to inspect files containing other charges against the same respondent . . . constitute[d] 'publicizing' the other files. . . ." in violation of Title VII (*Id.* at 9a, n.2).

C. *The EEOC's Disclosure Rules.*

In 1975, the EEOC issued detailed rules describing the persons and organizations to be granted access to EEOC case files, and the scope of disclosure which would be available to them. This rulemaking created an exception to the anti-publication requirement of Section 709(e) and affirmatively authorized disclosure.

1. *The EEOC disclosure regulations declare an exception to § 709(e).*

The EEOC's disclosure regulations, 29 C.F.R. §§ 1601.22 and 1610.17(d),[10] set forth the EEOC's policies concerning the disclosure of investigative files.[11] While the opening sentence of section 1601.22 professes adherence to section 709(e), the regulation creates an exception not apparent from a reading of the statute:

> This provision does not apply to such earlier disclosures to charging parties, or their attorneys, respondents or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief.[12]

Following the enactment of the 1974 amendments to the Freedom of Information Act ("FOIA"),[13] the EEOC deter-

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[10] These sections are quoted *supra* at 3-4.

[11] Former section 1601.20, effective until 1978, permitted "such earlier disclosures to the charging party, the respondent, [or] witnesses . . . as may be appropriate or necessary to the carrying out of the Commission's functions under the title. . . ." (Pet. 19a).

[12] The regulation also permits disclosure to representatives of interested Federal, State or Local authorities "as may be necessary to the carrying out of the Commission's functions, under Title VII. . . ." *Id.* This exception is not at issue.

[13] Pub. L. 93-502, 88 Stat. 1561, 5 U.S.C., § 552, effective February 19, 1975. The FOIA authorizes agencies to issue regulations to process requests for information thereunder. 5 U.S.C. § 552(a)(1)(C).

mined in its FOIA procedural regulations that the exceptions to non-disclosure created by section 1601.22 would be treated as follows:

> *Special disclosure rules apply to the case files for charging parties, aggrieved persons on whose behalf a charge has been filed, and entities against whom charges have been filed.* The special disclosure rules are available in the public reading areas of the Commission. Under sections 706 and 709, case files involved in the administrative process of the Commission are not available to the public.

29 C.F.R. § 1610.17(d).[14] (Emphasis supplied.) Several months later, on May 21, 1975, these rules were published (J.A. 55).

2. *The Special Disclosure Rules.*

The "special disclosure rules" referred to in section 1610.17(d) have been published in section 83 of the EEOC Compliance Manual (Pet. 33a-46a). These rules authorize disclosure of case files containing investigative data to many persons and organizations, including:

(1) Charging parties and their attorneys;

(2) "Aggrieved persons" and their attorneys in case files involving Commissioner charges;

(3) Persons filing on behalf of an "aggrieved person";

(4) Organizations filing on behalf of an "aggrieved person";[15] and,

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[14] Published at 40 Fed. Reg. 8171 (February 26, 1975).

[15] EEOC rules provide that charges may be filed anonymously by "any person, agency or organization" on behalf of a person claiming to be aggrieved. 29 C.F.R. § 1601.7; *see* 42 U.S.C. § 2000e-5(b). Competitors, unions or other organizations with interests

(5) Employees of EEOC funded groups (e.g., the Mexican American Legal Defense and Education Fund, Lawyer's Committee for Civil Rights Under Law).

EEOC Comp. Manual, § 83.5 (a-d) (Pet. 36a).[16] Disclosure is allowed so long as the files are sought "in connection with pending or contemplated litigation," and 180 days have passed since the charge was filed. EEOC Comp. Manual, § 83.3(a) (Pet. 35a).

Disclosure is not limited to the file of the charging party. Other files involving the same respondent which the District Director or Director of the Office of Systemic Programs believe to be "relevant or material to the private litigant's case" may also be revealed. EEOC Comp. Manual, § 83.7(c)(1) (Pet. 43a). Files pertaining to charges alleging the same basis of discrimination (e.g., race or sex) almost always meet this standard. *Id.* at § 83.7(c)(2). (*See* EEOC Brief at 31-32.) And even where other files involve a different basis of discrimination, they are still deemed relevant and disclosable "when the treatment afforded one protected class is probative of treatment afforded the private litigant's class. . . ." *Id.* Thus, the question of relevancy will generally be resolved in favor of the person seeking access.[17]

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inimical to those of the employer, as a "charging party" or his representative, could thus see the EEOC investigatory file of the employer.

[16] In this Court the EEOC contends that the persons to whom disclosure is permissible also includes witnesses (EEOC Brief at 19).

[17] Evenhandedness is not a hallmark of the special disclosure rules. While countenancing extensive pre-suit disclosure to charging parties and others on their behalf, section 83.2(e) prohibits disclosure of EEOC files to respondents until *after* a Title VII lawsuit has been commenced. This disparate treatment is consistent

The disclosure of investigative files permitted by the EEOC rules is substantially broader than that suggested by the question for review. The issue, therefore, is not the propriety of disclosure merely to "the parties immediately involved in the charge" (EEOC Brief at 2); rather, it is whether the EEOC's disclosure rules contravene section 709(e)'s ban on publication. We believe they do.

Summary of Argument

The EEOC disclosure rules conflict with Title VII and important policies underlying that statute. Since these rules treat with litigation assistance to charging parties, and affect important rights of employers, they are clearly substantive. Congress, however, has expressly limited the agency to the issuance of procedural regulations. Consequently, the rules exceed the agency's authority.

Moreover, section 709(e) expressly forbids the EEOC from disclosing, in any manner whatever, any information it obtains through its investigations. This reflects Congress's determination that disclosure of investigative files to anyone outside the government would interfere with the administration and enforcement of Title VII. The EEOC rules, which create significant exceptions to section 709(e), find no support in the language or history of the statute.

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with the EEOC's express policy of helping charging parties begin lawsuits. The Manual states:

> The Commission's policy is to cooperate with private Title VII litigants and to lend appropriate assistance in framing proper court complaints by allowing, when requested, access to information in other case files involving the same respondent which are available in the same District Office or National Programs Division, provided that the information in the other case files is relevant or material to the private litigant's case.

EEOC Comp. Manual, § 83.7 (Pet. 43a).

Equally important, by fostering private litigation, the rules undermine conciliation and direct federal enforcement, the enforcement methods preferred by Congress. Disclosure of investigative files frustrates the administrative process by causing premature judicial intervention. Charging parties are encouraged to file lawsuits before conciliation is attempted. Employers, too, will turn to the courts in order to protect the confidentiality of their records transmitted to the agency during EEOC investigations. Conciliation and voluntary settlements will become more difficult to achieve; cooperation will be replaced by antagonism. Thus, the Commission's disclosure rules do harm to the administration of the statute.

The Commission is able to conduct investigations, issue determinations and conciliate effectively without disclosure. Moreover, no considerations pertinent to the administration of Title VII are furthered by the rules. Finally, because the rules violate section 709(e) and are inconsistent with the policies underlying Title VII, this Court should accord them no deference.

ARGUMENT

POINT I

The EEOC Disclosure Rules Are Invalid Because They Are Substantive and Without Statutory Authority.

The EEOC's disclosure rules are substantive, affecting important rights of parties and others under Title VII. Since Title VII withholds authority from the EEOC to issue such rules, and, in any event, fails to provide a statutory source for them, the Court should declare them invalid.

A. *The EEOC Disclosure Rules Are Substantive.*

1. *The rules are analogous to the disclosure regulations in Chrysler Corp. v. Brown.*

This Court recently considered agency directives similar to the EEOC disclosure rules and concluded that they were substantive. In *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), a challenge was raised to regulations of the Office of Federal Contract Compliance Programs ("OFCCP") which provided for "public disclosure of information from records of the OFCCP and its compliance agencies." 441 U.S. at 287.[18] In language instructive here, the Court concluded that the OFCCP regulations were substantive because they:

> certainly affect individual rights and obligations; they govern the public's right to information in records obtained under Executive Order 11246 and the confidentiality rights of those who submit information to OFCCP and its compliance agencies.

Id. at 303;[19] *see Morton* v. *Ruiz*, 415 U.S. 199, 232 (1974).

The EEOC disclosure rules likewise affect the individual rights and obligations of charged employers, charging parties and others in Title VII proceedings. These rules govern access to information in records obtained by the

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[18] The OFCCP administers the executive order program mandating that government contractors take affirmative measures to eliminate discrimination in employment. 441 U.S. at 286-287. Government contractors are required to furnish the OFCCP with various documents such as EEO-1 reports and other statistical data concerning their work forces—information not unlike that sought by the EEOC during an investigation of a charge of employment discrimination. (*See* J.A. 19-21).

[19] Several courts of appeals decisions anticipated this test. *See, e.g., Reynolds Metals* v. *Rumsfeld*, 564 F.2d 663 (4th Cir. 1977), *cert. denied*, 435 U.S. 995 (1978), and cases cited therein at 669.

EEOC during Title VII investigations. The confidentiality rights of employers who submit information to the EEOC are compromised in the same manner as were the rights of those who submitted data under the OFCCP disclosure rules. The privacy interests of employees identified in the employers' records are also compromised.

Moreover, the EEOC rules adversely affect the substantive rights of employers by depriving them of their statutory right to try to resolve meritorious charges informally through conference, conciliation and persuasion.[20] The substantive nature of these rules is, therefore, even more obvious than was the case in *Chrysler*, where no similar rights were abridged.

2. *The EEOC disclosure rules have an express substantive purpose.*

The substantive character of the EEOC disclosure rules is confirmed by the purposes they are designed to serve.[21] The rules implement the agency's policy "to cooperate with private Title VII litigants and to lend appropriate assistance in framing proper court complaints by allowing, when requested, access to information in other case files involving the same respondent. . . . " EEOC Comp. Manual, § 83.7(c)(1) (Pet. 43a). *See Burlington Northern*, 582 F.2d at 1100 ("[T]he effect, and indeed the purpose of disclosing investigative material to charging parties as if they were not members of the public would be to encourage the filing of private lawsuits."). *See also H. Kessler & Co.* v.

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[20] *See* 42 U.S.C. § 2000e-5(b), and Point III, *infra*, at 36-38.

[21] The EEOC's changing rationale for permitting such disclosure —from *"carrying out the Commission's functions"* under Title VII to *"securing appropriate relief"*, highlights the litigation oriented purpose of current section 1601.22 and the special disclosure rules. (See n.11 *supra* p. 9, and accompanying text). The earlier rationale was arguably procedural; the present one is patently substantive.

EEOC, 472 F.2d 1147, 1151-1152 (5th Cir. 1972), *cert. denied*, 412 U.S. 939 (1973) *("Kessler")* ("[I]t is obvious that a charging party literally needs all the help he can get" to commence a timely action.)

An agency rule authorizing this kind of affirmative assistance to one party in an administrative proceeding was found to be substantive in *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969). There, the Court considered the National Labor Relations Board's "Excelsior" rule, requiring the disclosure of employee names and addresses to unions during representation proceedings.[22] The First Circuit had held that

> . . . *Excelsior's* purpose is what it appears to be on its face, a provision requiring the employer to furnish interested parties with affirmative assistance in conducting their election campaigns.
>
> Such assistance is substance, not Board procedure.

397 F.2d 394, 397-398 (1st Cir. 1968). This Court's plurality opinion specifically affirmed that holding, 394 U.S. at 764, n. 2, with a majority of the Justices agreeing that the rule was substantive. *Id.* at 775 (Douglas, J., dissenting) and 780 (Harlan, J., dissenting).

The purpose and effect of the EEOC's disclosure rules are indistinguishable in principle from the purpose and effect of the NLRB's *Excelsior* requirement. Both are intended to provide "affirmative assistance" to one party in an administrative proceeding, and both require the disclosure of information the employer normally would not release. Both afford a unique advantage to the recipient.[23]

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[22] This rule was articulated in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

[23] At least the NLRB's *Excelsior* rule has the virtue of equalizing the knowledge of the parties; the EEOC's rules, in contrast, dis-

In sum, since the EEOC disclosure rules affect individual rights and obligations, jeopardize statutory rights of employers, and provide affirmative assistance to charging parties, they are clearly substantive.[24] This is fatal; the EEOC has no power to issue substantive rules.

B. *The EEOC Is Prohibited From Issuing Substantive Regulations.*

Section 713(a) of Title VII unequivocally limits the EEOC to the issuance of "suitable *procedural* regulations to carry out the provisions of this title." (Emphasis supplied).[25] *See General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 140 (1976).

The legislative history of section 713(a) confirms that Congress intended to prevent the EEOC from issuing substantive rules. As originally drafted, section 713(a) contained no subject matter limitation on the EEOC's rulemaking authority. *See* H.R. Rep. No. 1370, 87th Cong., 1st Sess. (1963), reprinted in *Legislative History of Titles*

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criminate against employers by disclosing to them the agency's files (which often contain information from witnesses and other third parties), only *after* litigation is commenced. EEOC Comp. Manual, § 83.5(e) (Pet. 37a).

[24] Although the EEOC denominates its disclosure rules as procedural, the label which the agency places on its own rules "is not necessarily conclusive, for it is the substance of what the Commission has purported to do, and has done which is decisive." *Columbia Broadcasting System, Inc.* v. *U.S.*, 316 U.S. 407, 416 (1942); *see also Chamber of Commerce* v. *OSHA*, —— F.2d ——, 8 OSHC 1648, 1651 (D.C. Cir., July 10, 1980).

[25] Section 713(a) provides as follows:

> The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

42 U.S.C. § 2000e-12(a).

VII and XI of the Civil Rights Act of 1964, at 2169, 2001, 2014, 2031 (EEOC 1965) ("*Legislative History*").

An amendment to limit the EEOC's authority to issue procedural regulations only was offered during the House debates by Congressman Celler, a proponent of equal employment opportunity legislation. He explained:

> . . . if this amendment is adopted the Commissioner would have a right to issue procedural regulations as distinguished from substantive regulations. *It would make more definite the limitations of his powers.* I believe the amendment would clarify the situation.

110 Cong. Rec. 2575 (1964) (Emphasis supplied). This amendment was adopted, continued in the Dirksen-Mansfield Senate compromise and appears in the statute today. *Id.; Legislative History* at 3329.

Thus, both the language and legislative history of section 713(a) conclusively show that the EEOC may not issue substantive rules.[26] The disclosure rules, therefore, represent an attempt by the EEOC to exercise a power expressly denied it by Congress. The judgment below invalidating the rules should be affirmed.

C. *The EEOC Disclosure Rules Are Not Authorized by Any Statute.*

Assuming, *arguendo*, that the disclosure rules are procedural, they should nevertheless be invalidated because they lack the requisite statutory authority.[27] *Chrysler*

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[26] Since the rules are substantive, they should also be invalidated because they were not issued in accordance with the Administrative Procedure Act, 5 U.S.C. § 553. *See generally Chamber of Commerce* v. *OSHA*, 8 OSHC at 1652-1653.

[27] *See Parkridge Hosp.* v. *Califano*, —— F.2d ——, Nos. 77-1576 and 78-3171 (6th Cir. 1980) (A regulation authorizing disclosure of financial reports was upheld because 42 U.S.C. § 1306 expressly conferred such regulatory power.)

teaches that, irrespective of the label applied to a particular rule, the rule must be "rooted in a grant of power by the Congress and subject to limitations which that body imposes." 441 U.S. at 302. Just as the OFCCP in *Chrysler* was unable to demonstrate any "*statutory* grant of authority" for its disclosure regulation, *id.* at 306 (emphasis in original), the EEOC here cannot identify any statutory authority for its disclosure rules.[28] This flaw is also fatal.

The EEOC's lack of authority to issue the disclosure rules, however, is not the rules' only infirmity. As we next show, the rules also conflict with the unambiguous confidentiality mandate expressed in section 709(e).

POINT II

Section 709(e) Prohibits the Disclosure of Information in EEOC Investigative Files to All Persons and Organizations Outside the Government.

Section 709(e) of Title VII prohibits the EEOC from "mak[ing] public in any manner whatever any information obtained by the Commission pursuant to its [investigatory] authority . . . prior to the institution of any proceeding under this title involving such information." 42 U.S.C. § 2000e-8(e). As recognized by the court below, this wording makes explicit Congress's intent to prohibit pre-litigation disclosure of investigative files (Pet. 7a). This ban on disclosure was not inadvertent. Congress knows how to authorize the disclosure of investigative data when it so intends. That Congress set forth no exception to section

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[28] That the OFCCP was not faced with a statutory provision such as § 709(e), *prohibiting* disclosure, or a provision such as § 713(a), *limiting* its rulemaking authority, makes the case for invalidation even stronger here than it was in *Chrysler*.

709(e) confirms its intent to prevent pre-litigation disclosure of EEOC investigative files "to any individual outside the government." *Sears*, 581 F.2d at 946.

The EEOC's arguments to the contrary, discussed *infra* at pp. 24-30, are not supported by the history or purposes of section 709(e), and disregard the EEOC's inability to restrict disclosure solely to the charging parties.

A. *Congress Intended to Prohibit the EEOC From Disclosing Its Investigative Files to all Non-Governmental Persons and Organizations.*

1. *The language of the statute is unambiguous.*

To determine whether section 709(e)'s sweeping prohibition against disclosure admits of the exceptions created by the EEOC's disclosure rules, we first examine "the plain meaning of the relevant statutory language." *Mohasco Corp.* v. *Silver*, —— U.S. ——, 48 U.S.L.W. 4851, 4853 (1980). The statutory prohibition against disclosure to the public is clear: "Congress meant to prohibit the EEOC from giving information from its investigative files to any individual outside the government." *Sears*, 581 F.2d at 946. Nothing in the language of the section suggests that Congress intended to permit the EEOC to create exceptions.

2. *Congress intended the EEOC to comply with the standard practice of keeping investigatory data within the government.*

In *Sears*, the court construed section 709(e) in light of the "well-established practice throughout the government[29] . . . to forbid disclosure of sensitive data to any persons

[29] *See also California Brewers Ass'n* v. *Bryant*, —— U.S. ——, 100 S.Ct. 814 (1980), where, in the absence of a statutory definition of the term "seniority system", the Court relied in part on "com-

outside the government." 581 F.2d at 947.[30] Since other investigative agencies "such as the Department of Justice and the National Labor Relations Board, do not give to private litigants information the government has accumulated concerning parties it is investigating," the court reasonably concluded that Congress intended the EEOC to abide by that practice as well. *Id.*[31] Where Congress de-

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monly accepted notions about seniority. . . ." to construe the term. *Id.* at 819. Here, as *Sears* held, the commonly accepted meaning of "the public" refers to all non-governmental persons.

[30] This interpretation is consistent with the "policy in favor of inter-agency exchange of information . . .," *Shell Oil Co.* v. *Dep't of Energy*, 477 F. Supp. 413, 420 (D. Del. 1979), and finds support in Title VII itself. *See* 42 U.S.C. § 2000e-4(g)(1) (EEOC is empowered to cooperate with "regional, State, local and other agencies. . . ."); -4(h) (EEOC "shall . . . cooperate with other departments and agencies" in the performance of its educational and promotional activities); -14 (authorizing the establishment of an inter-agency coordinating council to promote inter-agency cooperation). *See also Emerson Elec. Co.* v. *EEOC*, 609 F.2d 898, 902 (8th Cir. 1979) (Release of EEOC investigative data to OFCCP under inter-agency Memorandum of Understanding upheld because "no public disclosure is authorized or contemplated" and because the possible injury from disclosure "would result only if the information transferred between the agencies were disclosed to the public.")

Consistent with *Sears*' view of section 709(e), courts have construed other non-disclosure statutes to permit disclosure only to government agencies. *See, e.g., Interco* v. *Federal Trade Comm'n*, 478 F.Supp. 103, 106 (D.D.C. 1979) (Disclosure of FTC documents to state attorneys general was "not a release to the 'public' within the meaning of . . . 15 U.S.C. § 46(f). . . ."); *Shell Oil Co.* v. *Dep't of Energy*, 477 F. Supp. at 434 (Disclosure of energy related data between federal agencies is permissible under 15 U.S.C. §§ 771(b) and 773(b) and 18 U.S.C. § 1905 because the commercial value of such data "is put at risk only by disclosure to the public and other disclosures which may result in its use in the market place.")

[31] In addition to these two agencies, many others are forbidden from disclosing investigatory materials. *See, e.g.*, Trade Secrets Act, 18 U.S.C. § 1905; Internal Revenue Code of 1954, § 7213; Federal Energy Administration Act, 42 U.S.C. §§ 771(b) and 773(b); Energy Supply and Environmental Coordination Act, 15 U.S.C. § 796(d).

termines that disclosure of investigatory data "serves the purposes described in the . . . statute," it has provided clear authorization for such agency action. *Parkridge Hospital* v. *Califano,* Slip opinion at 10.

Thus, Congress permits or forbids disclosure of investigative data depending upon the objectives of the particular statute. With respect to Title VII, Congress did specifically authorize some disclosure—it directed service of the charge on the employer. 42 U.S.C. § 2000e-5(b). *See H. Kessler & Co.* v. *EEOC,* 468 F.2d 25, 27 (5th Cir. 1972). It could have—but did not—permit disclosure of investigative information to charging parties or any other person.[32]

This view of section 709(e) is supported by Congress's decision to incorporate in Title VII the NLRB model for investigations.[33] The NLRB does not disclose the contents of its open investigative files outside that agency. *See NLRB* v. *Robbins Tire and Rubber Co.,* 437 U.S. 214 (1978).[34]

Congress could have easily authorized the EEOC to disclose its investigative files, as it did for the Federal Trade

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[32] There is other evidence in Title VII which shows that if Congress wished to authorize disclosure of data by the EEOC, it knew how to do so. Section 709(d) provides that the EEOC "shall furnish" to state or local agencies, upon request, information it obtained pursuant to its record-keeping requirements. 42 U.S.C. § 2000e-8(d). *See also* Note, 25 Wayne L. Rev. 1105, 1113 (1979).

[33] Section 710 of Title VII, 42 U.S.C. § 2000e-9, provides that for "investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of the National Labor Relations Act shall apply."

[34] *See also* § 102.118 of the Rules and Regulations of the National Labor Relations Board, 29 C.F.R. § 102.118 (1975); NLRB Case-Handling Manual, Vol. I, Unfair Labor Practice Proceedings, § 10056.1 (1975).

Commission (FTC)[35] and the Consumer Product Safety Commission (CPSC),[36] had it concluded that this would induce compliance with Title VII.[37] Instead, Congress forbade such disclosure, believing that under Title VII "maximum results from the voluntary approach will be achieved if the investigation and conciliation are carried on in private." *Legislative History* at 3267 (Remarks of Sen. Dirksen). *Cf. Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, —— U.S. ——, 100 S.Ct. 2051, 2056 (1980) (" . . . if Congress had intended to exclude FOIA disclosures from [the procedural safeguards of § 2055(b)(1)] it could easily have done so explicitly. . . . ").

In sum, the plain language of section 709(e) conclusively shows that the EEOC's disclosure rules conflict with sec-

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[35] 15 U.S.C. § 46(b) (FTC given discretion to release documents, except trade secrets and customer lists, obtained during its investigations.) Indeed, Congress considered but rejected the FTC model for the EEOC. (*See* EEOC Brief at 23, n.13.)

[36] 15 U.S.C. § 2055(b) (CPSC empowered to disclose information it acquires about consumer products).

[37] The EEOC contends throughout its brief that Congress implicitly exempted charging parties from section 709(e)'s disclosure ban. Where Congress believes disclosure to certain persons to be in the public interest, however, it explicitly exempts those persons from non-disclosure obligations. Thus, Congress carved out such an exception to a non-disclosure provision in section 4F(b) of the Clayton Act, 15 U.S.C. § 15f(b). That section permits the Attorney General to make available "investigative files or other materials" only to state attorneys general and only for use in an actual or potential Clayton Act case. This exception to the Clayton Act's general prohibition on disclosure "places the State attorneys general on a different footing than private parties" and was enacted "because of the important place State attorneys general occupy in Congress's scheme for anti-trust enforcement." *United States* v. *B.F. Goodrich Co.*, —— F.2d ——, Slip opinion at 2, No. 79-4009 (9th Cir. 1980). If Congress had intended to place EEOC charging parties on a different footing than the public generally for purposes of disclosure, it could have followed the Clayton Act model and expressly authorized disclosure of investigative files to them.

tion 709(e), especially in light of (1) Congress's failure to affirmatively authorize disclosure of investigative files and (2) the well-established governmental practice to forbid disclosure of investigative files to those outside the government. The EEOC's contrary view of that section is untenable.

B. *The EEOC's Disclosure Rules Are Inconsistent With the Language and Objectives of Section 709(e).*

1. *Nothing in the language of section 709(e) suggests that Congress contemplated anything but a complete prohibition on disclosure of investigative files.*

The EEOC argues that the language of the statute contemplates the exclusion of charging parties and others from the prohibition on public disclosure (EEOC Brief at 19-22). This argument is unpersuasive. The EEOC mistakenly focuses on the language of section 706(b), and makes no independent argument based on the substantially different language of section 709(e).[38]

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[38] The EEOC argues that since the complainant and respondent know the contents of the charge and are privy to conciliation materials, it would be absurd to construe "the public", to whom disclosure is barred, to include them (EEOC Brief at 20-21). This interpretation of section 706(b) has been rejected by the District of Columbia (*Sears*), Seventh (*Burlington Northern*) and Fourth Circuits. The reasons for this rejection are apparent. Although charges must be revealed to employers, there is every reason to believe that the employer will protect the charges from further dissemination. In contrast, disclosure of investigatory information to aggrieved employees invites wider dissemination. *See* pp. 30-31, *infra*. From the employer's perspective at least, the employee is a member of the "public."

Moreover, the clause in section 706(b), that "charges shall not be made public" is closely followed by a prohibition against using conciliation information as evidence in any subsequent proceeding. Since Congress prevented the EEOC from presenting this information to a court in prosecuting a lawsuit, it is highly unlikely that it intended to permit the Commission to disclose the same or similar information to aggrieved employees to aid them in their

Here, however, the issue is whether the EEOC may disclose the fruits of its investigations despite section 709(e), *not* whether the charge or information voluntarily relinquished during conciliation may be disclosed under section 706(b). Unlike section 706(b), the language of section 709(e) admits of no plausible interpretation which would exclude charging parties or witnesses from its prohibition.

Section 709(e), on the one hand, is sweeping. That section makes it unlawful for the EEOC to make public "in any manner whatever any information" obtained during its investigations. Section 706(b), on the other hand, is more focused. It provides only that "charges shall not be made public" and that "nothing said or done during and as a part of such informal [conciliation] endeavors may be made public. . . . " 42 U.S.C. § 2000e-5(b). Section 709(e) bars disclosure of investigative information "in any manner whatever", suggesting a Congressional concern with indirect disclosure; section 706(b) is more straightforward. By its terms it bars only direct disclosure by the Commission. In short, the language of section 709(e) cannot fairly be read to exclude the persons and organizations to whom the EEOC discloses its files.[39]

Even if the language of section 709(e) is not dispositive, inquiry should not stop there; "we must also look to the object and policy of the law." *Stafford* v. *Briggs*, —— U.S. ——, 100 S.Ct. 774, 780 (1980) (Citation omitted). The

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own court presentations. Thus, even if the Court believes an analogy can be drawn from section 706(b) to section 709(e), the proper construction of the former supports the view that "information obtained by the EEOC during settlement discussions with employers cannot be disclosed to anyone outside the government." *Sears*, 581 F.2d at 948-949.

[39] The EEOC does not interpret the word public consistently. Where the agency itself initiates suit, the EEOC treats charging parties no differently from other "members of the public" in passing on their requests for investigative information under the FOIA. EEOC Comp. Manual § 83.2; 29 C.F.R. §§ 1610.30-36.

"object and policy" of section 709(e) is not furthered by the disclosure rules.

2. *The objectives of section 709(e) confirm that the term "public" includes charging parties and all persons outside the government.*

The EEOC urges that its dubious interpretation of "the public" in section 706(b), *see* n.38 *supra*, should be mechanically applied to section 709(e) (EEOC Brief at 22). However, the two sections protect sufficiently different interests "to warrant the conclusion that they were employed in different parts of the act with different intent." *Atlantic Cleaners and Dryers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932).[40]

The charge and conciliation materials, protected by section 706(b) include information which the charging party either already knows, or which the employer has *voluntarily* and directly disclosed to him in the hope of securing a settlement.[41] In contrast, the investigative materials obtained by the EEOC—by investigatory subpoena, if necessary,—

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[40] The Court in *Atlantic Cleaners* recognized that "[m]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section." *Id.* at 433. The proper meaning "may well vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed." *Id. Accord: Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934); *Marshall* v. *Green Goddess Avocado Corp.*, 615 F.2d 851, 854 (9th Cir. 1980).

[41] As the EEOC notes, "the substance of a charge cannot be concealed from the charging party, who is the author of the charge." (EEOC Brief at 20.) Similarly, the "very concept of conciliation assumes that the parties to the process will be privy to what is said and done during conciliation negotiations. . . ." (*Id.* at 21.) These observations do not apply to the disclosure of investigative files.

are *involuntarily* disclosed to the agency, and generally consist of a wide variety of personnel and business data considered confidential by the employer. The investigation files often contain data from which the identity of employees can be readily ascertained, whereas disclosure to the charging party of either the charge or information for conciliation would not similarly invade the privacy of coworkers.[42]

Information voluntarily revealed by the employer during conciliation cannot be used against that employer in later litigation. *See* 42 U.S.C. § 2000e-5(b). Investigative materials, however, may be used during a subsequent trial. *See* 42 U.S.C. § 2000e-8(e). Investigative files often contain materials and documents relating to the employers' work force as a whole, whereas a charge and conciliation are generally limited to the specific charging party.[43]

These factors call for a strict application of the disclosure ban in section 709(e). There is no basis in the language or logic of that section to warrant excluding charging parties from "the public."

The EEOC's reliance on the language of section 706(b) to exclude charging parties and others from "the public" in section 709(e) is therefore misplaced. That charging parties should be included in the ban on disclosure is confirmed by the legislative history.

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[42] This Court has recognized that disclosing personnel files, which is permitted by the disclosure rules, may impose a great hardship on employees by subjecting them to "embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends." *Department of Air Force* v. *Rose*, 425 U.S. 352, 377 (1976); *cf. Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 317, 318 (1979).

[43] The scope of the information sought by the EEOC's interrogatory and subpoena in this case suggests the breadth of materials to be found in the agency's investigative file (*see* J.A. 19-21; 38-42).

C. *The Legislative History of Section 709(e) Fails to Support the EEOC's Exclusion of Charging Parties From "The Public".*

Apart from its unsupported assertion that the language of Title VII supports its disclosure rules, the EEOC relies on the admittedly "sparse" legislative history of the disclosure provisions (EEOC Brief at 22). That history, however, is unavailing to the Commission.[44]

1. *Senator Humphrey's explanation.*

Remarks by Senator Humphrey, who introduced the separate confidentiality provisions in sections 706(b) and 709(e), provide the only contemporaneous legislative explanation of these provisions. 110 Cong. Rec. 12723 (1964).[45] Senator Humphrey said that the prohibitions would not prevent "such disclosure as is *necessary* to the carrying out of the Commission's duties. . . ." *Id.* (Emphasis supplied.) To illustrate, he cited the disclosure to *witnesses* "that a *charge* had been filed and often that *certain evidence* had been received." *Id.* (Emphasis sup-

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[44] The lack of illumination provided by the legislative history of sections 706(b) and 709(e) has been generally recognized. *See Sears,* 581 F.2d at 947; *Kessler,* 471 F.2d at 1150, 1151; Comment, *Access to EEOC Files,* 46 U. Chi. L. Rev. 477, 483-484 (1979); Note, 25 Wayne L. Rev. at 1113.

[45] Senator Humphrey stated:

> Provisions preserving the confidentiality of Commission procedures have been added to sections 706(a) and 709(e). . . .
>
> It should be noted that this is a ban on publicizing and not on such disclosure as is necessary to the carrying out of the Commission's duties under the statute. Obviously, the proper conduct of an investigation would ordinarily require that the witness be informed that *a charge* had been filed and often that certain evidence had been received. Such disclosure would be proper. The amendment is not intended to hamper Commission investigations or proper cooperation with other State and Federal agencies, but rather is aimed at the making available to the general public of unproven *charges.*

Id. (Emphasis supplied.)

plied.) Nowhere did he say that the disclosure of investigative files to charging parties or others would be permitted.[46]

It is evident from a comparison of the special disclosure rules with Senator Humphrey's remarks, that the Commission has added its own substantive gloss to the Congressional intent. Although Senator Humphrey contemplated such disclosure as was "necessary" to investigation,—just enough to permit a reasonable investigation of a charge by the agency—the EEOC's rules go much further. They permit access to EEOC case files for the purpose of aiding charging parties in making litigation decisions. EEOC Comp. Manual §§ 83.5, 83.7(c)(1); (EEOC Brief at 37-38). The Senator's remarks did not contemplate disclosure of case files for this purpose.

2. *The 1972 legislative history.*[47]

The EEOC also seeks support from Congress's rejection of a record-keeping amendment proposed during the 1972 debates.[48] (EEOC Brief at 27, n. 15). This amendment would have explicitly granted Congress and government agencies the right to obtain copies of documents employers are required to maintain under section 706(c). The EEOC seeks to infer from this rejection a Congressional decision that the "required records deserved no greater protection than that afforded to other information in the Commission's

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[46] The EEOC's reliance on Senator Humphrey's remarks to justify its disclosure rules has provoked criticism in the scholarly journals. *See* Comment, *Access to EEOC Files*, 46 Univ. of Chi. L. Rev. at 484; Note, 25 Wayne L. Rev. at 1113.

[47] The 1972 legislative history, upon which the EEOC relies, is of questionable value in divining Congress's intent in 1964 when it enacted section 709(e), because "the intent of the Congress that enacted [the section] controls." *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979).

[48] *See* S. Rep. No. 415, 92nd Cong., 1st Sess. 55-56 (1971).

possession." (*Id.*) However, it is equally likely the amendment was rejected as unnecessary because "it merely stated Congress's understanding of section 709(e) as it now stands." *Sears,* 581 F.2d at 948, n. 9.[49]

The EEOC rules, therefore, are a far cry from the limited disclosure contemplated by the proponents of Title VII. Neither the sparse legislative history, nor as discussed earlier, the language of section 709(e), authorizes the wholesale release of case files to charging parties, witnesses, aggrieved persons, organizations and others. The EEOC's rules are simply an invention of the agency which are at odds with its statute.

Aside from these legal infirmities, the EEOC also overlooks the impracticability of restricting disclosure to charging parties.

D. *Disclosure of Investigative Files Cannot Be Restricted to Charging Parties.*

The absence in Title VII of any "effective means to limit distribution of investigatory materials to charging parties alone," *Sears,* 581 F.2d at 946, weighs heavily against the EEOC's assertion that disclosure to a charging party is not disclosure to the public (EEOC Brief at 20-21).[50] Once a charging party, his representative or a witness has access to the case files, further publication cannot be prevented.

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[49] Moreover, the rejected amendment applied solely to routinely kept records, not to investigatory information, and it made no reference to access by the "public." Therefore, any suggestion that Congress endorsed the EEOC disclosure policy by its rejection of this amendment lacks a reasonable basis. *See* Comment, *Access to EEOC Case Files,* 46 U. of Chi. L. Rev. at 485.

[50] Courts permitting inter-agency transfer of information despite non-disclosure statutes have been careful to note the existence of adequate restrictions on retransfer to the public. *See, e.g., Interco* v. *FTC,* 478 F.Supp. at 106; *Shell Oil Co.* v. *Dep't of Energy,* 477 F. Supp. at 434.

Although the EEOC maintains that it exacts from requesting parties promises not to disclose the contents of the investigative files, and has issued a form to this effect (Pet. 23a) "such promises obviously are not enforceable." *Sears*, 581 F.2d at 946.[51] In this case, the District Director of the EEOC candidly conceded that the Commission could not prevent charging parties from disseminating such information. "We can only advise them not to do so," he explained (J.A. 28).

Litigating disclosure after it has occurred is an illusory remedy. (*See* EEOC Brief at 37-38, n. 24). Confidentiality cannot be restored to EEOC files after they have been revealed. Indeed, an employer will seldom be able to prove that the charging party disclosed specific information, or the extent of the disclosure. Damages would be inadequate and difficult to ascertain. The interests of justice and judicial economy also would be disserved by compelling employers to initiate civil suits to enforce rights to confidentiality when Congress has prohibited the EEOC from making disclosures.

Moreover, since charging parties are not protective of a charged employer's interests, materials and information obtained from EEOC case files could be furnished to third parties, such as the media, to embarrass the employer or to unions or competitors for purposes unrelated to Title VII. In our view, these are precisely the evils which Congress sought to avoid by enacting section 709(e).

Thus, the language and purposes of section 709(e), its scant legislative history, and the practical deficiencies of the disclosure rules impel the conclusion that the disclosure rules violate section 709(e). Not only do they conflict with this section, but, as will be seen, they also run counter to

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[51] The facts of this case demonstrate that the Commission does not always obtain such an agreement. *See* n. 8 supra.

the general policy of the entire statute favoring conciliation and direct federal enforcement over private litigation.

POINT III

The Disclosure of Investigative Files Fosters Private Litigation and Conflicts With Title VII's Emphasis on Voluntarism and Direct Federal Enforcement.

Congress selected voluntary adjustment and suit by the EEOC as the primary enforcement mechanisms for Title VII.[52] The purpose and effect of the disclosure rules, however, is to stimulate private lawsuits. EEOC Comp. Manual §§ 83 (Introduction), 83.3, 83.7 (Pet. 33a, 34a, 35a, 43a). In this Point, we will show that this Court's consistent recognition of the primacy of conciliation and direct federal action is clear from the language and history of Title VII. By fostering private litigation, the disclosure rules "wreak havoc upon [Title VII's] intended primary remedy," *Burlington Northern,* 582 F.2d at 1100, n. 7.[53]

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[52] Title VII unambiguously favors conciliation over litigation. If an investigation reveals that there is "reasonable cause" to believe the charge is true, the EEOC

> [*s*]*hall* endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion.

42 U.S.C. § 2000e-5(b) (Emphasis supplied.) Only if the EEOC is "unable to secure from the respondent a conciliation agreement *acceptable to the Commission,* may the EEOC commence a civil action. *Id.* (Emphasis supplied.) And if the EEOC successfully negotiates an acceptable conciliation agreement to which the charging party agrees, the individual may not commence an action. *Id.* Indeed, even after a civil action has been initiated, the statute authorizes the EEOC to seek a stay to permit "further efforts of the Commission to obtain voluntary compliance." *Id.*

[53] In this case, the EEOC attempts to justify its disclosure rules by emphasizing the importance of the private litigant in enforcing Title VII (EEOC Brief at 40-42). However, in *General Tel. Co.* v. *EEOC,* —— U.S. ——, 100 S.Ct. 1698 (1980), where a contrary argument suited its purposes, the EEOC urged that "Congress contemplated that direct federal enforcement, rather than actions brought by private litigants, would become the primary

A. *This Court Has Recognized That the EEOC's Conciliation Powers Are the Primary Means for Enforcing Title VII.*

When Congress enacted Title VII in 1964, "cooperation and voluntary compliance were selected as the preferred means" for achieving the statute's goal of equality of employment opportunities. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *Johnson* v. *Railway Express Co.*, 421 U.S. 454, 461 (1975). This emphasis on conciliation and voluntarism as the primary enforcement mechanism was retained in the 1972 amendments to Title VII.[53a] *See Great Amer. Fed. S. & L. Ass'n* v. *Novotny*, 442 U.S. 366, 372 (1979); *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 365 (1977); *United Steelworkers* v. *Weber*, 443 U.S. 193, 204 (1979) (Blackmun, J., concurring).

B. *The Legislative History Confirms That Congress Viewed Private Litigation as a Subordinate Remedy to Direct Federal Enforcement.*

When Title VII was enacted as part of the Civil Rights Act of 1964, the EEOC was limited to investigatory and

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enforcement mechanism for Title VII following the 1972 amendments." *See* EEOC Brief in *General Tel. Co.* at 10, n. 3. These contradictory positions suggest that the Commission's "interpretation here is primarily litigation inspired." *Cf. Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 100 S.Ct. at 2062, n. 17.

[53a] EEOC officials have testified that conciliation, not private litigation, remains the chief remedy for enforcing Title VII. *See, e.g.*, Testimony of Eleanor Holmes Norton, Chair of the EEOC, during Congressional oversight hearings in 1977, where she stated that because of the many charges filed with the EEOC, "[a]ll of our procedures are being shaped with the objective of encouraging prompt and fair conciliations." Oversight Hearings on Equal Employment Opportunities Before The Subcommittee on Employment Opportunities, 95th Cong., 1st Sess. 8 (1977). She further testified that "the importance of encouraging settlement of Title VII claims cannot be overstated. The congressional intent to encourage settlement is clear in the statutory language mandating conciliation. But the practical imperative is even more demanding." *Id.* at 11.

conciliatory functions. *See* 42 U.S.C. § 2000e-5(b) (1970 ed.).

By 1972, Congress had become convinced that the failure to grant the EEOC enforcement powers was a serious flaw in Title VII. *General Tel. Co.* v. *EEOC*, 100 S.Ct. at 1704, quoting from S. Rep. No. 415, 92nd Cong., 1st Sess. (1971). *See Burlington Northern*, 582 F.2d 1099. The statute's enforcement procedure was therefore amended to culminate in the EEOC's authority to bring a civil action. *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. at 359.

This amendment made clear that while private suit was still available, "the EEOC was to bear the primary burden of litigation." *General Tel. Co.* v. *EEOC*, 100 S.Ct. at 1704. The Section-By-Section Analysis of the amendments,[54] which "provides the final and conclusive confirmation of the meaning" of the private remedy provisions, *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. at 365, states that:

> It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC or the Attorney General, as appropriate.

118 Cong. Rec. 7168 (1972).

Indeed, Congress almost abolished the private Title VII action altogether,[55] but retained it "to make sure that the

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[54] This Analysis was before the Senate, 118 Cong. Rec. 7165, 7168 (1972), and the House, 118 Cong. Rec. 7563 (1972). It was also adopted in the Conference Report. S. Conf. Rep. No. 681, 92nd Cong., 2d Sess. (1972).

[55] A Senate amendment (No. 877 to S. 2515) to delete the remedy was defeated by a tie vote of 33-33. 118 Cong. Rec. 3373 (1972). The amendment was introduced because its sponsor believed the possibility of a private suit "reflects badly upon the effort to induce a respondent to enter into a conciliation proceeding with a view of reaching an agreement with the state agency or with the EEOC

person aggrieved does not have to endure lengthy delays if the Commission . . . does not act with due diligence and speed." Section-by-Section Analysis, 118 Cong. Rec. 7168. Only to enable an aggrieved party "to escape from the administrative quagmire which occasionally surrounds a case caught in an overloaded administrative process" was private litigation preserved. H.R. Rep. No. 238, 92nd Cong., 1st Sess. 12 (1971).[56] As the Seventh Circuit concluded in *Burlington Northern,* "there can be no doubt that the enforcement scheme enacted with the 1972 amendments lodged the primary responsibility for insuring equal employment opportunity with the Commission." 582 F.2d at 1099. (Citation omitted.)

Since, as we show next, the EEOC disclosure rules "necessarily undercut the preferred enforcement scheme of comprehensive negotiation and settlement," *Burlington Northern,* 582 F.2d at 1100, by "fueling private lawsuits", *Sears,* 581 F.2d at 946, they cannot be reconciled with Title VII.

C. *The Disclosure Rules Undermine the Preferred Means For Enforcing Title VII By Fostering Private Litigation.*

In *Johnson* v. *Railway Express Agency,* 421 U.S. 454 (1975), this Court recognized that:

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or with the employee himself or herself." 118 Cong. Rec. 3368 (1972) (Remarks of Sen. Hruska). Attempts to eliminate the private lawsuit in previous Congresses had failed when the legislators decided not to enact any amendments to Title VII. *See* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act,* 40 Geo. Wash. L. Rev. 824, 832 (1972).

[56] Since the EEOC now asserts that "the average time for processing a charge has been reduced to about two months" (EEOC Brief at 10), the policy considerations which led Congress to retain the private right of action are largely obsolete. Charging parties do not need access to investigative files to decide whether to litigate, but can instead rely upon the EEOC's prompt disposition of their charge.

> the filing of a lawsuit might tend to deter efforts at conciliation, that lack of success in the legal action could weaken the Commission's efforts to induce voluntary compliance, and that a suit is privately oriented and narrow, rather than broad in application, as successful conciliation tends to be.

Id. at 461. *See Int'l Union of Elec. Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 237, n.9 (1976).

Since disclosure of investigative files encourages private litigation, the EEOC rules produce the undesirable results noted in *Johnson*. They encourage charging parties to bring suit rather than allow the EEOC to attempt conciliation efforts. Employers will not freely participate in an EEOC investigation by producing voluminous records, knowing that at any time after 180 days from the filing of a charge[57] their records may be turned over to a private party to be used in litigation against them.[58] Any benefit derived from private litigation fostered by the disclosure rules, therefore, will be far outweighed by the injury to the public interest in undermining voluntary adjustment of discrimination charges.

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[57] Or even earlier if the charge is dismissed or if the charging party can show a "compelling need." EEOC Comp. Manual § 83.3. (Pet. 34a-35a).

[58] The EEOC does not address these concerns. However, the employers in this case, *Burlington Northern* and *Sears*, were obviously concerned about disclosure. Thus, as soon as the disclosure rules were issued in 1975, they triggered several major lawsuits. Many other employers confronted with EEOC investigations did not bring suit, in all likelihood, because they were unaware of the scope of disclosure permitted by the rules, or relied upon assurances of confidentiality sometimes given by the EEOC (*Sears*, 581 F.2d at 945), or lacked the resources to mount a legal challenge to the agency's rules.

1. *The disclosure rules induce charging parties to litigate rather than conciliate.*

The EEOC disclosure rules induce charging parties to "opt out" of the administrative process. They are prompted to commence litigation before the Commission has had an opportunity to determine the merit of their charges and, if reasonable cause is found, to eliminate any alleged discrimination by "informal methods of conference, conciliation and persuasion." 42 U.S.C. § 2000e-5(b).

The present case illustrates the substantiality of these concerns. Associated alleged in its Amended Complaint that the failure of the EEOC to grant confidentiality increased the likelihood of unnecessary litigation by impeding voluntary efforts to resolve the charges (J.A. 15). The Company also alleged that if information were provided, it could be disclosed to potential litigants to the Company's detriment (J.A 15). These fears were justified.

On June 22, 1976, Alice M. Corvino, one of the charging parties in this case (J.A. 8), filed a Title VII action against Horne's, based in part on the allegations in her EEOC charge.[59] Prior to the commencement of Ms. Corvino's action, her attorneys were given access to her EEOC case file and files of other employees (J.A. 103).[60] Ms. Corvino's attorneys also examined at least one EEO-1 Report for Horne's. (J.A. 105).

Had the Company been assured of confidentiality and been permitted to cooperate in the EEOC investigation, a finding of no reasonable cause might have resulted. Ms.

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[59] *Corvino* v. *Joseph Horne Co., a Division of Associated Dry Goods Corporation*, Civil Action No. 76-826 (W.D. Pa.).

[60] The Commission also disclosed documents from other Horne's case files to charging parties' attorneys prior to commencement of other suits. (J.A. 102-104.)

Corvino then would have been less likely to bring suit. Even if a contrary result had been reached, litigation still might have been avoided by a satisfactory conciliation agreement. These possibilities were foreclosed by the EEOC's refusal to preserve the confidentiality of the information it sought.[61]

The courts of appeal agree that the disclosure rules succeed in fostering private litigation. *See Burlington Northern,* 582 F.2d at 1100; *Sears,* 581 F.2d at 946, *Kessler,* 472 F.2d at 1151-1152.[62] By providing charging parties with the materials upon which to base a lawsuit before attempting to conciliate the charge, the EEOC short-circuits the statutory scheme. This administrative restructuring of a Congressionally designed enforcement process should not be condoned.

2. *EEOC investigations will be hindered by employers seeking judicial protection against disclosure.*

In addition to encouraging charging parties to litigate at the expense of conciliation, the EEOC's disclosure rules

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[61] Had the Company, on the other hand, supplied the information and records sought by the EEOC, those materials would have been disclosed and presumably used in Ms. Corvino's action. This would have enabled Ms. Corvino and other potential litigants to obtain judicially unregulated pre-complaint discovery. This is abhorrent to fundamental notions of due process, and should not be allowed. *See McKinney* v. *Amer. Can Co.,* 22 EPD ¶ 30,707 (E.D. Mo. 1979) ("The EEOC was not created to be a convenient means of discovery for farsighted plaintiffs. ... ." *Id.* at p. 14, 686.

[62] In upholding the EEOC's interpretation of section 709(e), the court in *Kessler* stressed what it viewed as the important role of private litigation to enforce Title VII. Its failure to recognize the importance of conciliation was criticized in *Sears* and *Burlington Northern,* and more recent Fifth Circuit decisions have cautioned against interfering with "the extremely high premium put by Congress on voluntary settlement[s]. . . ." *United States* v. *City of Miami,* —— F.2d ——, 22 FEP Cases 846 (5th Cir. 1980) and cases cited at 851.

also impede its investigations by forcing employers to seek judicial protection for the data provided to the agency. As the District of Columbia Court of Appeals noted in *Sears:*

> If EEOC files were open to charging parties, employers, realizing the lack of any effective mechanism within the EEOC for restricting the use of information once it leaves the hands of the EEOC, in many cases would refuse to comply voluntarily with investigative demands by the EEOC under § 709(e), thereby forcing the Commission to use subpoena power and suit in the district court in place of amicable negotiations. By doing so, employers would at least have the opportunity to persuade a court to impose effective restrictions on the scope of distribution—something which is beyond the power of the EEOC to do.

581 F.2d at 941. *Accord: Burlington Northern,* 582 F.2d at 1100.

If this Court approves the EEOC disclosure rules, employers will no doubt continue to seek court orders limiting disclosure and prohibiting additional dissemination.[63] This judicial intervention, although necessary, will tend to change the character of EEOC investigations from cooperative to adversarial proceedings.

Thus, extensive disclosure will hamper the favored enforcement tool of Title VII: voluntary adjustment followed, if necessary, by suit by the EEOC.[64] Even where private litigation is not begun, the disclosure rules will compel employers to refuse to cooperate in EEOC investigations without judicial protection, for fear of giving private parties ammunition to use against them in litigation.

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[63] *See, e.g., EEOC* v. *Univ. of Pittsburgh,* —— F. Supp. ——, 22 FEP Cases 569 (W.D. Pa. 1980).

[64] For a discussion of other adverse consequences arising from the disclosure rules, *see* Note, 25 Wayne L. Rev. at 1116-1117.

As we show next, these high costs to the enforcement of Title VII are entirely unnecessary, since the proper administration of Title VII does not require disclosure of investigative files.

POINT IV

Disclosure of Investigative Files Is Unnecessary for the Proper Administration of Title VII.

The EEOC's plea that early disclosure of investigative data is necessary to the proper administration of Title VII does not withstand scrutiny (*see* EEOC Brief at 28-44).[64a] Disclosure of investigatory files is simply not compelled by the logic of the statute or the need of the EEOC to conduct effective investigations.

A. *Congress Provided Title VII Plaintiffs With Statutory Assistance Other Than Disclosure of Investigative Files.*

The EEOC argues that disclosure of case files is necessary to help charging parties commence litigation (EEOC Brief at 40-42).[65] Regardless of the merit of this solicitude

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[64a] The EEOC offers no empirical evidence to support its assertion that its disclosure rules are responsible for the increased number of settlements since 1977 (EEOC Brief at 29, n. 16). Since the EEOC asserts its disclosure policies have been consistent since 1965 (EEOC Brief at 6), the increased rate of settlements since 1977 obviously cannot be attributed to the disclosure rules. Moreover, the EEOC's claimed settlement rate since 1977 (44%) is considerably lower than the rate of the NLRB, an agency which does *not* disclose its investigative files. *See NLRB* v. *Robbins Tire and Rubber Co.*, 437 U.S. at 222, n. 17. ("According to the Board, 94% of all unfair labor practice charges filed are resolved short of hearing. . . .")

[65] In so contending, the EEOC overlooks the function of its own reasonable cause determinations. Section 40.1 of the EEOC Comp. Manual provides, in part:

> The reasonable cause decision shall constitute a determination that the claim has sufficient merit to warrant litigation if the

towards one party to a legal dispute, the *means* chosen by the agency (disclosure of investigative files) was forbidden by Congress in section 709(e). The statute "gives the private Title VII litigant adequate means of prosecuting the litigation," *Sears,* 581 F.2d at 947-948, without such disclosure. Section 706(k) permits "the prevailing party . . . a reasonable attorney's fee as part of the costs" in the court's discretion. A court is also empowered to "appoint an attorney . . . and [to] authorize the commencement of the action without the payment of fees, costs or security." Section 706(b) (1). Clearly, the EEOC's concern that a private litigant may have difficulty securing counsel has been "substantially alleviated by the 1972 Act." *Burlington Northern,* 582 F.2d at 1101.[66]

B. *Disclosure of Case Files Is Not Necessary to EEOC Investigations or Determinations.*

Notwithstanding section 709(e), the EEOC contends that "limited" disclosure "of investigatory information is essential to the Commission's fulfillment of its statutory mandate at virtually every step of the administrative process."

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matter is not thereafter conciliated by the Commission or the charging party.

If reasonable cause exists to believe that a Title VII violation has occurred, the charging party will have ample opportunity to bring suit and obtain discovery in his own right. But this will not occur until *after* the EEOC has had a chance to conciliate, a result consistent with the statutory scheme. Since the EEOC now resolves charges, on the average, in two months (EEOC Brief at 10) a charging party would suffer no hardship by allowing the administrative process to run its course.

[66] The 1972 amendments extended the time within which a suit must be commenced, from 30 to 90 days, following receipt of the right to sue letter. *Sears,* 581 F.2d at 948. This change, as well as the statutory provisions noted above, persuaded the District of Columbia Circuit that "aggrieved employees are not unduly hindered in commencing suit within the required time unless they are given ready access to the investigatory files of the EEOC." *Id.*

(EEOC Brief at 42.) This is gross overstatement. Disclosure of investigative files is not needed either for the EEOC's investigations or determinations, the two steps in its administrative process for which the EEOC asserts disclosure is essential. (EEOC Brief at 29-32 and 32-36.)

1. *Dislosure of investigative files is not necessary for the EEOC to conduct its investigations.*

The EEOC wrongly argues that its investigations "depend upon early and direct disclosure of information *to the parties.*" (EEOC Brief at 29.) (Emphasis supplied.) If this were true, the Commission would not have prohibited disclosure of investigative data to a respondent-employer until *after* suit is commenced. EEOC Comp. Manual, § 83.5 (e) (Pet. 37a).[67] Thus, the EEOC's own rules refute its contention that its investigators must be "able to confront the parties with their adversaries' evidence." (EEOC Brief at 28.)[68]

Similarly, the EEOC's further claim that disclosure of investigative information is necessary to make its fact-finding conferences effective (EEOC Brief at 29-30), is also contradicted by its own rules. Section 14.7 of the EEOC Compliance Manual[69] makes clear that the disclosure permitted

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[67] Even the statement of facts which the charging party is required to file in support of the charge (EEOC's Brief at 29), is not disclosed to the employer under this rule until suit is filed.

[68] Contrary to the Commission's suggestion (EEOC Brief at 28-29), information is *not* disclosed in a ritualistic exchange among EEOC investigators and parties in an effort to authenticate documents or obtain corroboration. Indeed, the Commission's policy is that "generally, interviews should be conducted in *private.*" EEOC Comp. Manual § 23.1(a) (Emphasis in original.) Rather, the EEOC simply makes its case files available to charging parties and others. EEOC Comp. Manual § 83.3(a) (Pet. 35(a)).

[69] This section, entitled "Conference Format," provides that the fact-finding conference is "an informal investigative technique, not

by the EEOC rules does *not* occur at the fact-finding conference. As the EEOC observes (EEOC Brief at 30), "the fact-finding conference is primarily an investigative forum" at which the EEOC obtains information; it is not a vehicle to disseminate investigative data protected by section 709(e).[70]

2. *Disclosure of investigative files is unnecessary for the agency's determinations.*

Just as disclosure of investigative files is unnecessary to an effective investigation, it is unnecessary to the agency's determinations.[71] Nothing in the regulation governing determinations, 29 C.F.R. § 1601.21, or section 40 of the Compliance Manual, which prescribes the format for determination letters, indicates that disclosure is necessary.

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an adversary proceeding." No disclosure of information or documents is authorized. Even if evidence has been previously submitted to the EEOC, it is *not* disclosed to the other party at these conferences. At most, a "pre-prepared [*sic*] *list* of evidence . . . will be presented to the parties at the table." *Id.* at 14.7(a) (Emphasis supplied). If "the respondent has brought evidence to the conference", it is *not* disclosed to the charging party; rather, "it is received by the [investigator] who will give a brief descriptive title to each type of document presented, so that the charging party is aware of the type of evidence presented to the Commission by the respondent." *Id.*

[70] Since the EEOC does not now make available its files at the fact-finding conference, invalidation of its disclosure rules would not render the conference "meaningless and perfunctory". (EEOC Brief at 30.) In addition, preventing the EEOC from *disclosing* investigative data would not hamper the EEOC from *acquiring* such data, the true purpose of any investigation. If settlement discussions are undertaken at these conferences, the parties can voluntarily disclose to each other whatever information they deem appropriate to further negotiations without violating section 709(e).

[71] The EEOC no longer gives detailed factual findings in the determination letter. (EEOC Brief at 10, n. 6.) Evidently, the EEOC recognizes that such disclosure is unnecessary to fulfill the purposes of the determination.

Indeed, the Manual states that the purpose of the determination letter is to state whether the "case is worthy of litigation. . . ." EEOC Comp. Manual § 40.1. The brevity of the determination letter[72] prevents the EEOC from disclosing in that letter the often voluminous contents of EEOC investigative files. Since the determinations now do no more than summarize the salient points of the investigation, invalidation of the disclosure rules will not hamper the Commission.[73]

In addition, the apparent statutory purpose of the reasonable cause determination, to trigger conciliation efforts, *see* 42 U.S.C. § 2000e-5(b), can be accomplished without making case files available under the disclosure rules. To serve as the basis for conciliation, the determination need only capsulize the evidence, recite the parties' contentions and explain the agency's decision. This suffices to give the charging party the benefit of the EEOC's appraisal of the case without jeopardizing the confidentiality of investigative files or infringing on other employees' privacy rights.[74]

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[72] The ordinary "one and two issue case will result in a letter of less than a page and a half." *Id.* at § 40.7. Even in complex, multi-issue cases, determinations will be made in "less than three pages." *Id.* The facts and conclusions portion of the letter "should be concise" and should be derived from "paragraph '(c)' of the investigator's memo." *Id.* Paragraph "(c)" in turn, is expected to contain only "a brief summary of the facts. . . ." *Id.* at § 29.2(d).

[73] The EEOC has continued to function in the District of Columbia, Seventh and Fourth Circuits despite the decisions in *Sears, Burlington Northern* and this case. In fact, the EEOC assertion that it now processes most charges within sixty days (EEOC Brief at 10), undermines its argument that non-disclosure would hamper the effective administration of Title VII.

[74] Such a summary would also serve other purposes of the determination letter. The Compliance Manual provides that the "primary purpose of a 'no cause' decision is to indicate to CP [the Charging Party] that the Commission has fully considered his allegation and to enable CP to understand why the Commission has concluded that discrimination did not occur." EEOC Comp.

Thus, disclosure of its files is not necessary for the EEOC to either investigate charges or make determinations. In fact, as discussed in Point III, *supra,* the precipitate disclosure of investigative files actually impedes the Commission's investigative and conciliation functions. The judgment below enjoining such disclosure should be affirmed.

POINT V

This Court Should Not Defer to the EEOC's Administrative Interpretation of Section 709(e).

In a final effort to secure judicial approval of its disclosure rules, the EEOC asks this Court to defer to its administrative interpretation of section 709(e). (EEOC Brief at 26.) As will be seen, however, deference is not warranted here.[75]

A. *The EEOC's Present Interpretation of Section 709(e) Was Not Contemporaneous With the Enactment of That Section, Has Not Been Consistent and Does Not Engage the Agency's Expertise.*

The EEOC contends that "in the past fifteen years, the Commission has not varied from [its] contemporaneous construction of its statute. . . ." (EEOC Brief at 25.) The special disclosure rules, however, were not adopted until May 21, 1975. (J.A. 12). Consequently, these rules are

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Manual, § 125.2. It is already the Commission's policy in this situation "to state the evidence as simply as possible." *Id.* The purpose of a "cause" decision "is to persuade R [Respondent] that a violation of title VII has occurred." *Id.* at § 125.3. However, the EEOC already does this without disclosing its files to employers. EEOC Comp. Manual § 83.2(a).

[75] None of the courts which have considered the question have deferred to the EEOC's interpretation. *See e.g., Sears,* 581 F.2d at 946, n. 6, *Burlington Northern* court, 582 F.2d at 1099.

not contemporaneous with the enactment of section 709(e) in 1964.

Moreover, the EEOC regulations governing disclosure have *not* been consistent over the years. The agency has changed the purpose of its disclosure regulations from assisting *the EEOC* in fulfilling its administrative functions under Title VII to assisting *charging parties* in preparing for litigation and securing appropriate relief. *Compare* former 29 C.F.R. § 1601.20 (1975) *with* current 29 C.F.R. § 1601.22 (Pet. at 3-4). *See* nn.11 and 26 *supra.*

Nor is this a case where the court should defer to "an agency's technical expertise and experience", *FPC* v. *Florida Power and Light Co.*, 404 U.S. 553, 563 (1972).[76] The EEOC's presumed substantive expertise does not extend to questions arising under information statutes,[77] or provide the agency with any special insight into what Congress meant by the statutory term "public."

Accordingly, deference is not appropriate here because "the question sought to be reviewed does not significantly engage the agency's expertise." *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970); *see Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 14 (1968) (Harlan, J. dissenting).

B. *Congress Has Not Approved the EEOC's Interpretation of Section 709(e).*

The EEOC's assertion that since Congress has not indicated its disapproval, "it must be assumed that Congress

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[76] At least one commentator has agreed. Comment, *Access to EEOC Files*, 46 U. of Chi. L. Rev. at 486.

[77] With respect to the FOIA, another informational statute, "Congress rejected the traditional rule of deference to administrative determinations by '[p]lacing the burden of proof upon the agency' to justify the withholding. S. Rep. No. 813, p. 8; H.R. Report No. 1497, p. 9." *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 80 (1973) (Douglas, J. dissenting).

has approved the agency's construction" of section 709(e) (EEOC Brief at 28), cannot survive scrutiny. This Court will not presume general congressional awareness of an administrative construction when a complex statute is being substantially revised. *Securities and Exchange Commission* v. *Sloan,* 434 U.S. 103, 118-120 (1978). Here, the EEOC has failed to demonstrate that the question now before the Court was even considered, much less decided, by Congress during the 1972 amendments.[78]

C. *The EEOC's View of "The Public" Is Inconsistent With Section 709(e).*

The EEOC's interpretation of section 709(e) should not be given deference for its "interpretation of the statute cannot supersede the language chosen by Congress." *Mohasco Corp.* v. *Silver,* 48 U.S.L.W. at 4855, citing *General Electric Co.* v. *Gilbert,* 429 U.S. 125, 140-142 (1976).[79] As

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[78] Moreover, at the time the amendments were introduced, the only court to have considered the EEOC disclosure practices was the district court in *H. Kessler & Co.* v. *EEOC,* 53 F.R.D. 330 (N.D. Geo. 1971), which had invalidated them. There, the court held that section 709(e) "preclude[d] the EEOC from disclosing information obtained through its investigation to the charging party, the charging party's attorney, or the petitioner here, prior to institution of court proceedings under Title VII of the Civil Rights Act." *Id.* at 341. Thus, Congress's failure to amend section 709(e) in 1972 signals, if anything, its acquiescence in the then prevailing judicial construction. *See Lorillard* v. *Pons,* 434 U.S. 575, 580 (1978).

[79] Generally, EEOC rules are entitled to less deference than those issued by agencies which have been granted the power to issue substantive regulations. *See General Electric Co.* v. *Gilbert,* 429 U.S. at 140-142. The Court has apparently "retreated" from its earlier view expressed in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), relied upon by the EEOC (EEOC Brief at 26), that EEOC rules are entitled to great deference. *See International Bhd. of Teamsters* v. *United States,* 431 U.S. 324, 390-391 (1977) (Marshall, J., dissenting in part and concurring in part). *See also City of Los Angeles* v. *Manhart,* 435 U.S. 702, 719, n. 36 (1978) (The district court "should not have given conclusive weight to the EEOC guideline.").

was the case in *Silver* and *Gilbert*, the EEOC has construed a section of Title VII to reach a result plainly at odds with Congress's intent.

Regardless of the EEOC's prior administrative practice concerning section 709(e), the Court is not relieved of its "responsibility to determine whether that practice is consistent with the agency's statutory authority." *Securities and Exchange Commission* v. *Sloan*, 436 U.S. at 118. "[C]ourts" rather than agencies "are the final authorities on issues of statutory construction. . . ." *Volkswagenwerk* v. *Federal Maritime Comm'n*, 390 U.S. 261, 272 (1968) (Citations omitted). Here, the EEOC's construction is wrong.

As the courts of appeals have found, the disclosure rules at best reflect a strained interpretation of the term "public". They not only conflict with the language and purposes of section 709(e), but also undermine the Congressional policy favoring conciliation and direct federal action as the preferred means for enforcing Title VII.

The disclosure rules should be invalidated.

CONCLUSION

The disclosure rules represent an ill-advised attempt by the EEOC to substitute its judgment for that of Congress in determining how to best achieve the substantive goals of Title VII. This case calls for the application of the principle that faithful adherence to the legislative requirements "is the best guarantee of evenhanded administration of the law". *Mohasco Corp.* v. *Silver*, 48 U.S.L.W. at 4856.

The judgment of the court of appeals invalidating the special disclosure rules should be affirmed.

Dated: August 11, 1980

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No. 79-1068

In the Supreme Court of the United States

OCTOBER TERM, 1980

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ASSOCIATED DRY GOODS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

ASSOCIATED DRY GOODS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent contends that the Commission's disclosure regulations and rules were promulgated without statutory authority; that they are inconsistent with the statutory language, scheme and legislative history; and that they are invalid because they are unlike those adopted by other administrative agencies. For the reasons set forth below and in our opening brief, these contentions are without merit. Accordingly, the judgment of the court of appeals should be reversed.

I. THE COMMISSION'S DISCLOSURE REGULATIONS AND RULES ARE AUTHORIZED BY STATUTE

Section 713(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-12(a), provides in relevant part that, "The Commission shall have authority from time to

time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title." Respondent's attack on the Commission's regulations (Br. 13–19) is necessarily premised therefore on the assertion that the regulations are "substantive," rather than "procedural."[1] That assertion is itself without substance because the regulations at issue govern the disclosure of information to persons directly involved in agency proceedings, and it is well-established that such regulations are procedural in character. See, *e.g.*, *FCC* v. *Schreiber*, 381 U.S. 279, 289–294 (1965); *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 307–308 (1933). See also *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543–545 (1978).

Respondent nonetheless contends (Br. 15) that the regulations are substantive because they affect substantive rights of confidentiality. In *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941), this Court rejected a similar attack on Fed. R. Civ. P. 35. The validity of a procedural rule turns not on whether the rule affects substantive rights, but on "whether [the] rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach* v. *Wilson & Co.*, *supra*, 312 U.S. at 14. Moreover, as the District of Columbia Circuit has noted, "all procedural requirements may and do occasionally affect substantive rights, but this possibility does not make a procedural regulation a substantive one." *Ranger* v. *FCC*, 294 F.2d 240, 244 (D.C. Cir. 1961) (Prettyman, J.).[2]

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[1] Respondent raised this issue only in a footnote in its brief in the court of appeals (Brief for Appellee at 7 n.8 (No. 78–1696)). Neither court below addressed the issue.

[2] In *NLRB* v. *Friedman*, 352 F.2d 545 (3d Cir. 1965), the court upheld the decision of the Board's General Counsel to employ union ex-

Even if the Commission's disclosure regulations were properly considered to be "substantive," however, they are nonetheless valid as interpretative regulations. This Court has repeatedly recognized that while the Commission lacks authority to issue regulations that have the force and effect of law, its substantive guidelines are valid regulations interpreting its organic law and, as such, are entitled to deference. See, *e.g.*, *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 142–143 n.4 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433–434 (1971). See also *Batterton* v. *Francis*, 432 U.S. 416, 425–426 n.9 (1977); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Moreover, the regulations and rules at issue here constitute the Commission's longstanding and consistent interpretation of the disclosure provisions of Title VII. Sections 706(b) and 709(e) of Title VII, 42 U.S.C. 2000e–5(b) and

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perts in analyzing information subpoenaed from an employer. The court noted that, "No trial or administrative proceeding could pursue truth effectively if an absolute right to keep private matters confidential was conceded to all parties involved" (*id.* at 548). That observation demonstrates that respondent's reliance (Br. 14) on *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), is misplaced. While the information that Chrysler sought to protect from disclosure may be similar in character to that which is at issue here, the regulations involved in *Chrysler* are dissimilar both in nature and in purpose. The *Chrysler* regulations provided for disclosure of information to the general public under the Freedom of Information Act, 5 U.S.C. 552, whereas the regulations at issue here involve disclosure of information to persons directly involved in, and in furtherance of, administrative proceedings. Likewise, respondent's reliance (Br. 16) on *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969), is misplaced. In *Wyman-Gordon*, the Court held only that the Board had failed to follow the Administrative Procedure Act when it ruled that employers must compile employee lists for union use in representation elections; the Board conceded that that requirement was "substantive" (*id.* at 765). The Commission's regulations here do not require employers to compile information solely to assist charging parties; the Commission seeks, for its own use, information which may also be disclosed to both parties to promote prompt resolution of the controversy pursuant to statutory mandate.

2000e-8(e).[3] They are entitled to deference unless contrary to the language or purpose of the statute.[4]

As we have fully discussed in our opening brief (Pet. Br. 28–43), the disclosure of information to parties and witnesses is an essential part of the Commission's administration of Title VII. If the Commission lacked authority to promulgate rules and regulations governing disclosure, either the work of the Commission would be halted or disclosure decisions would have to be made on the less satisfactory basis of *ad hoc* determinations, which might lead to unnecessary unpredictability and inconsistency.

II. THE COMMISSION'S CONSTRUCTION OF THE STATUTE IS CONSISTENT WITH CONGRESS'S INTENT AND ESSENTIAL TO THE PROPER ENFORCEMENT OF THE STATUTE

1. The disclosure provisions were enacted as "*a ban on publicizing and not on such disclosure as is necessary to the carrying out of the Commission's duties under the*

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[3] Respondent's reliance (Br. 14) on *Morton* v. *Ruiz*, 415 U.S. 199, 236–237 (1974), is misplaced. In that case, the Court declined to uphold, as an interpretative rule, a regulation that was inconsistent with congressional intent and did not represent the agency's consistent interpretation of the statute. Likewise, in *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), the Court held only that OFCCP's public disclosure provisions did not satisfy the "except as provided by law" exception to 18 U.S.C. 1905, because they were neither based on an express grant of statutory authority nor properly promulgated under the Administrative Procedure Act, and did not therefore have the force and effect of law accorded legislative regulations. The Court carefully noted, however, that its holding did not imply that the rules were invalid because of a lack of express statutory authority (441 U.S. at 309 n.40, 315).

[4] Respondent contends (Br. 18 n.26) that the Commission did not follow the procedural requirements of the Administrative Procedure Act. That argument was not made in the court of appeals and it is therefore not properly raised here. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Moreover, the Commission's disclosure rules are exempt from the notice and comment requirements of the Act because they are procedural and interpretative rules. 5 U.S.C. 553(b)(A); *Chrysler Corp.* v. *Brown*, *supra*, 441 U.S. at 314. It should

statute" (110 Cong. Rec. 12723 (1963) (remarks of Sen. Humphrey) (emphasis added)). As we have shown in our opening brief (Pet. Br. 18–25), the purpose of the public disclosure provisions[5] is manifest in the language and scheme of the statute, and the Commission's construction of the statute is supported by the legislative history. The various attempts by respondent, amici, and the court below to settle upon a viable alternative construction only lend further substance to the Commission's view. Respondent variously contends that disclosure to persons directly concerned is categorically barred (Br. 25), and that the Commission may sometimes "capsulize the evidence [and] recite the parties' contentions" (Br. 29, 44).[6] The court below held that "indirect" disclosure was permitted (Pet. App. 6a), and one of the amici joins in that view (Equal Employment Advisory Council Br. 9–10). The second amicus asserts that "limited" disclosure is permitted

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be noted, however, that 29 C.F.R. 1601.22 was in fact published for notice and comment. See 42 Fed. Reg. 47828, 47831 (1977); 42 Fed. Reg. 42022, 42024 (1977). Finally, the prelitigation disclosure rules contained in the EEOC Compliance Manual are instructions to the staff, interpreting the Commission's regulations, and do not therefore require notice and comment. See, *e.g.*, *Pesikoff* v. *Secretary of Labor*, 501 F.2d 757, 763 n.12 (D.C. Cir.), cert. denied, 419 U.S. 1038 (1974); *Shell Oil Co.* v. *FPC*, 491 F.2d 82, 87 (5th Cir. 1974); *Hall* v. *EEOC*, 456 F. Supp. 695, 701–702 (N.D. Cal. 1978); *Sears, Roebuck & Co.* v. *EEOC*, 435 F. Supp. 751, 761 (D.D.C. 1977), aff'd in part and rev'd in part, 581 F.2d 941 (D.C. Cir. 1978).

[5] Respondent now inexplicably suggests (Br. 1–2 n.1, 24–25 & n.38) that Section 706(b) is irrelevant despite respondent's reliance on it in the complaint (App. 11), and the fact that both courts below relied on that Section in analyzing the issues presented (see Pet. App. 5a–7a, 24a–25a, 31a). Respondent's suggestion can only be explained by its reluctance to consider together the two disclosure provisions in light of the presumption of consistent meaning afforded to words used in various provisions of a statute. See *Mohasco Corp.* v. *Silver*, No. 79–616 (June 23, 1980), slip op. 18. See also *H. Kessler & Co.* v. *EEOC*, 472 F.2d 1147, 1151 (5th Cir. 1973) (en banc); *Sears, Roebuck & Co.* v. *EEOC*, 581 F.2d 941, 948 (D.C. Cir. 1978).

[6] Respondent (Br. 44) ignores the fact that reasonable cause determinations must provide sufficient information to inform employers of the claims that may be asserted in Commission suits. See, *e.g.*, *EEOC* v. *General Electric Co.*, 532 F.2d 359 (4th Cir. 1976).

when "*absolutely* needed for the E.E.O.C. to fulfill its statutory duties" (American Retail Federation Br. 3; emphasis added). Each of these formulations casts serious doubt on the enforceability of the criminal sanctions contained in the disclosure provisions. Either the persons immediately involved in the administrative process are members of the public or they are not; there is no middle ground that will save the criminal penalties which Congress intended to impose upon Commission personnel who improperly publicize unproven charges of discrimination.[7]

2. a. Respondent's contention (Br. 13) that the Commission need not share factual information with the parties during the administrative process is simply incompatible with the Commission's statutory obligation to effectuate settlements when possible.[8] The keystone of the Commis-

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[7] Respondent also suggests (Br. 11, 16, 42) that the Commission's regulations and rules unfairly favor charging parties to the disadvantage of employers. That assertion is unfounded. The Commission's regulation governing disclosures during the administrative process has remained virtually unchanged since 1965 (see 42 Fed. Reg. 47831 (1977)) and has consistently provided for disclosure of information "prior to the institution of any proceedings * * * to charging parties, or their attorneys, respondents or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief." 29 C.F.R. 1601.22. Pursuant to that regulation, necessary disclosures are made to both parties, on an even-handed basis, during the administrative process. In accordance with its interpretation of Section 709(e), the Commission has had separate rules governing prelitigation disclosures; these rules, which are now contained in § 83 of the EEOC Compliance Manual, apply only to disclosures "in connection with pending or contemplated litigation" (EEOC Compliance Manual § 83.3(a); Pet. App. 34a–35a). Both charging parties and employers are permitted to review the files after materials relating to conciliation efforts have been removed. EEOC Compliance Manual § 83.6(f). See also 29 C.F.R. 1601.26(b). Employers are treated differently from charging parties only to the extent that charging parties are permitted to review the files before litigation is commenced, whereas employers must wait until a lawsuit is actually filed (EEOC Compliance Manual § 83.5(e); Pet. App. 37a). This difference in treatment is based upon the fact that an employer will have no need to review the file, at that stage, unless the charging party decides to litigate his claim.

[8] Respondent attempts to support its all-encompassing definition of "public" by noting (Br. 22) that, "[w]ith respect to Title VII, Congress

sion's administrative process is the fact finding conference, where the parties meet together with a Commission representative to review the evidence, "resolve * * * factual disputes," and possibly discuss settlement (EEOC Compliance Manual § 14.7). Unless the Commission can compel the parties' attendance and the submission of information, the conference will be a meaningless formality.[9] At all events, it should be obvious that settlements will occur during the administrative process only when the parties have reason to believe that material facts are not being hidden from them. Only then can the Commission hope to use its knowledge and expertise to effectuate settlements. There is no basis for respondent's claim that the Commission's policy is unnecessary to the fulfillment of its statutory duties.[10]

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did specifically authorize some disclosure—it directed service of the charge on the employer. 42 U.S.C. § 2000e–5(b)." Respondent argues therefore (*ibid.*; footnote omitted) that Congress "could have—but did not—permit disclosure of investigative information to charging parties or any other person." The provision upon which respondent relies was, of course, amended in 1972, and it no longer *requires* service of the charge itself. The legislative history demonstrates, however, that Congress intended that the Commission should exercise its discretion in determining whether the actual charge should be served in individual cases. See 118 Cong. Rec. 4941 (1972). Cf. *Chromcraft Corp.* v. *EEOC*, 465 F.2d 745, 748 (5th Cir. 1972). Congress's granting of that discretion is consistent with the Commission's construction of "public"; it is not consistent with respondent's.

[9] *Amicus* EEAC asserts (EEAC Br. 9) that, "It strains credulity to believe that an investigation or a realistic view of the facts by the parties during conciliation requires more than indirect disclosure of the substance of documents." As we have previously noted (Pet. Br. 35 & n.21), successful conciliation necessarily entails an abandonment of important legal rights, in which reasonable persons will not be likely to acquiesce without hard evidence of the facts.

[10] Respondent contends (Br. 26–27, 43) that voluntary disclosure of factual information is sufficient for these purposes. That suggestion would effectively place the conciliation process in the hands of the employer. It is unlikely that charging parties would be willing to settle their claims based on their employers' selective recital of the facts. Moreover, respondent erroneously asserts (Br. 44 n.73) that the Commission has continued to function, without disclosing information, in

b. We have previously answered respondent's contention (Br. 32–38) that the Commission's prelitigation disclosure rules "foster private litigation." The restricted prelitigation access to files permitted by the disclosure rules tends to discourage the filing of meritless lawsuits, and does not adversely affect conciliation efforts (Pet. Br. 38–40).[11] In addition, we note that respondent's arguments improperly minimize the importance that Congress has attributed to private litigation in securing compliance with the provisions of Title VII. Congress certainly expressed the hope that compliance might ordinarily be achieved through the Commission's efforts, and without the need for litigation, but Congress has also emphasized

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the Fourth, Seventh and District of Columbia Circuits. Respondent's assertion is based on an incorrect factual assumption. First, the order of the court below has been stayed, except as to respondent, pending this Court's decision. Second, the Commission has interpreted the decisions in *Sears*, *supra*, and in *Burlington Northern, Inc.* v. *EEOC*, 582 F.2d 1097 (7th Cir. 1978), cert. denied, 440 U.S. 930 (1979), as applicable to all prelitigation disclosure in cases involving Commissioner's and consolidated charges, and in cases involving charges against Sears, Burlington and the Brotherhood of Railway, Airline and Steamship Clerks. EEOC Notice N-915. However, it was not until the decision below that a court of appeals expressly held that Sections 706(b) and 709(e) prohibit the Commission from disclosing information during its processing of individual charges.

[11] That the Commission now processes most charges within two months does not show that prelitigation disclosure is unnecessary (Br. 35 n.56), but it does show that disclosure will not adversely affect conciliation. If the Commission fails to secure a settlement agreement acceptable to both parties, it generally will have completed the administrative process within two months by issuing a "no reasonable cause" determination, by entering a settlement agreement without the assent of the charging party, or by failing to achieve a settlement agreement and issuing a "right to sue" letter. In these circumstances, the charging party has an unequivocal right to bring suit in federal court; in most cases, however, the charging party can make a reasoned determination whether to exercise that right only by reviewing the Commission's investigative file. Finally, the assertion by amici (ARF Br. 15, EEAC Br. 22–23) that prelitigation disclosure somehow circumvents the discovery provisions of the Federal Rules of Civil Procedure ignores the fact that the Commission is free, once a lawsuit has been filed, to provide such disclosure in any event. See Section 709(e) of Title VII, 42 U.S.C. 2000e–8(e).

that "[t]he primary concern must be protection of the aggrieved person's option to seek a prompt remedy in the best manner available." H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 13 (1971). Accord, *General Telephone Co.* v. *EEOC*, No. 79-488 (May 12, 1980), slip op. 7. See also S. Rep. No. 92-415, 92d Cong., 1st Sess. 24 (1971); 118 Cong. Rec. 3372 (1972) (remarks of Sen. Williams). While Congress may have hoped to accomplish its goal of eliminating employment discrimination by means of voluntary accommodation, respondent erroneously attributes more importance to that means than to the ultimate end for which it was devised.[12]

The Commissions's prelitigation disclosure rules, which assist charging parties in making an informed prelitigation analysis of the viability of their claims, is consistent with the principle that "[a]ll available resources should be available to [the] individual." 118 Cong. Rec. 3372 (1972) (remarks of Sen. Williams). We have previously discussed the rationale for these rules (Pet. Br. 36-44), and we have noted that certain materials contained in companion files are sometimes released because, for reasons of administrative convenience, all relevant materials may not be contained in the charging party's file (Pet. Br. 31-32).[13] The

[12] Contrary to respondent's assertion (Br. 25 n.39), the Commission's Freedom of Information Act disclosure policy is not inconsistent with its interpretation of the disclosure provisions. The Commission has always maintained that the parties, while not members of the public under the disclosure provisions, should have their disclosure rights determined by the Commission under the provisions of Title VII, rather than under the provisions of the Information Act. In *Charlotte-Mecklenburg Hospital Authority*, v. *Perry*, 571 F.2d 195 (4th Cir. 1978), therefore, the Commission took the position that the parties, while having a special status under Title VII, should have no greater disclosure rights than the general public when they choose to sue under the Information Act. At all events, the Commission now withholds information contained in "open" investigative files under this Court's decision in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978).

[13] As we have previously noted (Pet. Br. 32 n.19), the question whether the Commission may share information gathered in connection with charges filed by a member of the Commission is not at issue here because no such charge has been filed.

Commission allows charging parties to review only relevant evidence gathered in connection with other charges filed against the same respondent in the same district office. The rationale for that practice rests on the fact that the existence or nonexistence of a pattern of discrimination is often indispensable in determining whether an individual's claim has merit. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804-805 (1973).[14]

Finally, we note that there is no substance to respondent's contention (Br. 30-32) that the Commission's disclosure rules encourage the dissemination of confidential information to persons who are not directly involved in the administrative proceeding. We have previously stated (Pet. Br. 37-38 n.24) that we know of no case since 1965 in which that possibility has materialized. It is disingenuous, therefore, to suggest that the Commission is unable to enforce its disclosure rules.[15] Similarly, there is no merit

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[14] The report filed by the Senate Committee on Labor and Welfare, in connection with the 1972 amendments, makes the same point (S. Rep. No. 92-415, 92d Cong., 1st Sess. 5 (1971) (footnote omitted)):

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. It was thought that a scheme that stressed conciliation rather than compulsory processes would be most appropriate for the resolution of this essentially "human" problem, and that litigation would be necessary only on an occasional basis. Experience has shown this view to be false.
>
> Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements. * * *

In a real sense, of course, "title VII actions are by their very nature class complaints" (*id.* at 27).

[15] The Commission's policy concerning prelitigation disclosure has been consistently applied since 1965 (App. 32-33). See also *H. Kessler*

to respondent's assertion (Br. 36) that employers will resist providing such information if this Court should uphold the Commission's regulations. That assertion ignores two important facts. First, employers have generally cooperated with the Commission under these regulations and rules for the past fifteen years. Second, any lack of cooperation on the part of employers is far more likely to result from the possibility that the Commission will subsequently use the information in the Commission's own litigation against the employer.[16]

III. THAT THE COMMISSION'S POLICIES MAY BE UNLIKE THOSE OF OTHER AGENCIES IS IMMATERIAL

Respondent asserts that other agencies do not share investigative information with the parties. While that assertion may be correct in some circumstances, it is immaterial. The legislative history of Title VII does not show that Congress intended the Commission to follow the practices of any other agency in this respect. Agencies are generally afforded some latitude in devising procedural mechanisms for carrying out their particular duties (*FCC* v. *Schreiber*,

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& Co. v. *EEOC*, 53 F.R.D. 330, 332 (N.D. Ga. 1971), aff'd in part and rev'd in part, 472 F.2d 1147 (5th Cir.) (en banc), cert. denied, 412 U.S. 939 (1973). While more detailed instructions to the staff were published in the EEOC Compliance Manual in 1975 (see Pet. Br. 6 n.2), the only substantial change then effected was the addition of a requirement that persons sign a formal non-disclosure agreement; formerly an informal agreement had generally been deemed satisfactory (App. 32). Contrary to respondent's contention (Br. 7 n.8), such an agreement was signed here (see App. 77, 103, 109).

[16] Amici suggest that the Commission's disclosure of information is barred by the Trade Secrets Act, 18 U.S.C. 1905 (see ARF Br. 22–23, EEAC Br. 23–30). That contention was not made in the court of appeals and it is not properly raised here. At all events, the Trade Secrets Act does not invalidate the Commission's regulations because, assuming that the Act has any application in these circumstances, it must be applied on a case-by-case basis. Persons who decline to produce evidence frequently believe that the materials sought are "confidential." Whether specific materials are thus protected from disclosure must be determined on the facts of each case.

supra, 381 U.S. at 289-291), and the Commission's disclosure policies necessarily reflect the special and unprecedented functions that Congress has assigned to it. The Commission is unlike certain other agencies in that it must not only investigate charges and make a reasonable cause determination, but it must attempt to obtain a voluntary settlement before it can seek judicial enforcement. The Commission's administrative process therefore involves a more continuous and intimate participation by the charging party than do other agency proceedings.[17] As we have shown (Pet. Br. 34-36), the Commission's authority to disclose information is essential to successful conciliation. At all events, respondent has pointed to no case in which an agency has been precluded from sharing information with the parties or witnesses in furtherance of its investigation, the obtaining of rebuttal evidence, or the negotiation of a settlement.

CONCLUSION

The judgment of the court of appeals should be reversed.

Repectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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OCTOBER 1980

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[17] Charging parties also have a special place in this statutory scheme because they retain the right to sue, regardless of the Commission's determination: "The EEOC's civil suit was intended to supplement, not replace, the private action." *General Telephone Co.* v. *EEOC*, No. 79-488 (May 12, 1980), slip op. 7. It is noteworthy that the National Labor Relations Board, upon whose practices respondent relies for comparison, directs its regional office to "openly discuss" the facts with the parties when the possibility of settlement is real, despite its general policy against prehearing disclosures. See *NLRB* v. *Robbins Tire and Rubber Co.*, No. 77-911, NLRB Br. 19.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

ASSOCIATED DRY GOODS CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN RETAIL FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT ASSOCIATED DRY GOODS CORPORATION

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IN THE

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No. 79-1068

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN RETAIL FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT ASSOCIATED DRY GOODS CORPORATION

Interest of *Amicus Curiae**

The American Retail Federation (the "Federation") is a federation of state retail associations in all 50 states and the District of Columbia, and 33 national retail associations. Their membership consists of a wide variety of retail stores, ranging in size from small neighborhood retailers to large national chains. Through its members, the Federation represents well over one million retail establishments, which employ over thirteen million workers.

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* The written consents of the parties for participation of the amicus have been obtained and filed with the Clerk of the Court.

The issue presented in this case is of vital importance to retailers. A charge of discrimination by a single employee at a single location may result in a broad investigation of the retailer's employment practices at all of its locations. As part of its investigation, the Equal Employment Opportunity Commission (the "E.E.O.C." or the "Commission") may ask to examine and copy any business record remotely dealing with personnel practices. Under the Commission's present interpretation of Title VII, the investigatory file containing this information is routinely made available to the charging party and to other individuals who file "related" charges against the employer. As a practical matter, the E.E.O.C. has no viable means of preventing further distribution of the information to third parties, for whatever use they may choose. Moreover, this massive penalty of wholesale disclosure is triggered by the simple filing of a charge—whether or not meritorious.

The serious threat which this disclosure poses to the business of every retailer cannot be underestimated. Retailing is a very competitive and sensitive business. The E.E.O.C.'s file may contain such material as the wage and salary structure of the retailer (including salary and bonus figures for middle and upper management, which are often tied to profitability), performance records reflecting sales, profit and loss statements, discipline and promotion records, and other confidential business information. The Commission's practice of releasing such data to charging parties and other interested individuals increases the risk that competitors and special interest groups will learn of the information and use it for their own purposes and to the retailer's detriment. For example, competitors would be able to lure away key personnel, such as buyers, through their knowledge of the wage and salary structure.

The decision of the Court in this case will have a far-reaching impact in the area of protecting the confidential

business information of a retailer. For this reason, the Federation desires to present its views to the Court.

Summary of Argument

The issue before this Court is whether the E.E.O.C. may disclose to individuals not within the government sensitive business information submitted to it in confidence, even though no court proceeding has been commenced. While limited disclosure is permitted when absolutely needed for the E.E.O.C. to fulfill its statutory duties, wholesale disclosure of investigatory and conciliation data to private persons is contrary to law and in excess of the E.E.O.C.'s powers.

Sections 706(b) and 709(e) of Title VII forbid public disclosure of *any* investigative or conciliation materials. The E.E.O.C.'s regulations and disclosure rules interpret the word "public" to exclude charging parties, respondents, their attorneys and witnesses. Although "public" is not defined in Title VII, the E.E.O.C.'s disclosure practices violate Sections 706(b) and 709(e). The wording of the statute, its legislative history, and its statutory purpose not only fail to support the E.E.O.C.'s position, but also indicate that private persons—including charging parties, respondents and witnesses—are encompassed within the word "public". When Sections 706(b) and 709(e) are read as part of the framework of numerous Congressional enactments and judicial decisions which protect investigative data and confidential business information from disclosure to parties and non-parties, the illegality of the E.E.O.C.'s disclosure rules becomes apparent. Moreover, the rules hinder the operation of Title VII by undermining the statute's purpose of voluntary compliance and conciliation. Under the current practice of the E.E.O.C., charging par-

ties are encouraged to litigate their cases in private suits rather than await E.E.O.C. attempts at conciliation, since the charging parties know that they can have wholesale access to confidential file information long before the E.E.O.C. officially acts. The attitude of the E.E.O.C. discourages employer cooperation, since entrusting business secrets to the agency is akin to storing water in a sieve.

The disclosure rules go far beyond what is necessary for the E.E.O.C. to perform its duties. The purpose of the provisions should be to allow only that disclosure which is absolutely necessary for a thorough investigation. As they presently stand, the rules transform the agency into a private discovery tool, and only serve to spark and fuel private litigation.

Finally, assuming *arguendo* that such wholesale disclosure of confidential business information to private parties is not foreclosed by Title VII, the Trade Secrets Act, 18 U.S.C. §1905 (1976), forbids disclosure of such information to charging parties. The E.E.O.C.'s disclosure rules are also substantive rules within the meaning of the Administrative Procedure Act, 5 U.S.C. §553 (1976), and as such are beyond the Commission's powers under Title VII.

ARGUMENT

I.

Title VII Prohibits Disclosure of Information to Private Persons Involved in the Investigation Unless Such Disclosure Is Absolutely Necessary for the E.E.O.C.'s Functions.

A. *The Language and Legislative History of Sections 706(b) and 709(e) of Title VII Reflect Congressional Concerns Over Governmental Disclosure of Confidential Business Information and Investigatory Files.*

As part of the enforcement scheme of Title VII, Congress enacted provisions to insure the confidentiality of information which employers are required to submit to the E.E.O.C. after a charge of employment discrimination has been filed. Section 709(e), 42 U.S.C. §2000e-8(e) (1976) ("Section 709(e)") protects information that the E.E.O.C. obtains during the course of its investigation of a charge by making it unlawful for any employee of the E.E.O.C. *"to make public in any manner whatever"* such information prior to the institution of an administrative or judicial proceeding[1] under Title VII (emphasis added). Section 706(b), 42 U.S.C. §2000e-5(b) (1976) ("Section 706(b)") provides that "nothing said or done during and as a part of" conciliation of charges between the E.E.O.C.

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[1] While "proceeding" is not defined in Title VII, for the purpose of Section 709(e) it encompasses only formal adjudicatory hearings in which evidence developed through the investigation is formally presented to a fact-finder, and not informal agency actions such as negotiations or conciliations. *Cf. New York Gaslight Club, Inc.* v. *Carey*, 22 FEP Cases 1642 (U.S. 1980). For instance, a Commission determination of reasonable cause does not constitute a "proceeding" for the purpose of disclosing investigative data to the public. *Sears, Roebuck and Co.* v. *E.E.O.C.*, 581 F.2d 941, 949 n. 11 (D.C. Cir. 1978).

and the parties "may be made public by the Commission . . . without the written consent of the persons concerned." Both of these provisions carry criminal penalties for violations.

While the word "public" is not defined in Title VII, the E.E.O.C. has interpreted "public" in these provisions to exclude private persons interested in the processing of the charge, including charging parties, witnesses and respondents. 29 C.F.R. §§1601.22, 1610.17(d). "Special disclosure rules" followed by the E.E.O.C. for these persons allow charging parties to have full access to its investigative files 180 days after a charge has been filed with it. E.E.O.C. Compliance Manual, §83.3(a), 83.5(a) (Pet. App. 34a-35a, 36a). The charging party and his attorney are also given access to investigatory files compiled as a result of "related" charges filed by other individuals. E.E.O.C. Compliance Manual, §83.7(c) (Pet. App. 43a). The respondent and his attorney, however, are only given access to the investigatory file compiled on the charge in question, and even then only after the charging party has filed suit. E.E.O.C. Compliance Manual §83.5(e) (Pet. App. 37a).

This strained interpretation of "public" is contrary to its common and intended usage.[2] "Public" as used in these sections encompasses all members of the general public, including private persons involved in the investigation of the charge. A party is as much a member of the public as one who has no interest in the proceedings. In fact, "public" is generally used in disclosure statutes to embrace all who are outside the government, including private parties.

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[2] *Webster's Seventh New Collegiate Dictionary*, p. 690, defines "public" as "of, relating to, or affecting *all* the people or the whole area of a nation or state" and "accessible to or shared by *all* members of the community" (emphasis supplied).

See, e.g. Consumer Product Safety Commission v. *GTE Sylvania*, 100 S. Ct. 2051, 2056 (1980); *N.L.R.B.* v. *Robbins Tire and Rubber Co.*, 437 U.S. 214 (1978); *N.L.R.B.* v. *Sears, Roebuck and Co.*, 421 U.S. 132 (1975).

One of the issues in *Robbins Tire, supra*, was whether a party had a greater right of access to investigative file information under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552(b), than any other member of the public. In that case, the Court upheld a policy of non-disclosure of all information in open investigatory files, citing the potential of "interference" in the enforcement process. *Id.* at 239. The Court concluded that a party was as much a part of the "public" as those without a legal interest in the investigation. While a party's "rights are [not] in any way diminished by its being a private litigant, . . . neither are they enhanced by [a] particular, litigation-generated need for these materials." *Id.* at 242, n. 23. *See also* Brief for Petitioner at page 19, n. 11.

Congress emphasized its concern for confidentiality in Section 709(e). By barring disclosure of investigatory information *"in any manner whatever"*, Congress intended to make clear to the E.E.O.C. that any disclosure of investigative information to anyone outside the government was to be limited to the absolute minimum needed by the Commission to carry out its duties, and in a manner so as not to compromise the confidentiality of such information. These emphatic words are not to be regarded as "mere surplusage". *New York Gaslight Club, Inc.* v. *Carey*, 22 FEP Cases 1642, 1645 (U.S. 1980). "Absent a clearly expressed legislative intention to the contrary," the straightforward reading of the word "public" in Sections 706(b) and 709(e) conclusively includes parties and witnesses. *Consumer Product Safety Commission* v. *GTE Sylvania, supra*, 100 S. Ct. at 2056. *See also Mohasco Corp.*

v. *Silver*, 23 FEP Cases 1, 4-5 (U.S. 1980) (plain meaning of word "filed" in Section 706(e) of Title VII controls absent Congressional intention to the contrary).[3]

Although the legislative history of Sections 706(b) and 709(e) is "sparse", it supports inclusion of parties and witnesses within the definition of "public". *Sears, Roebuck and Co.* v. *E.E.O.C.*, 581 F.2d 941, 947 (D.C. Cir. 1978). During the debate on Title VII in the Senate in 1964, Senator Humphrey stressed that disclosure of information from investigatory files under Section 709(e) was to be

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[3] Contrary to the E.E.O.C.'s assertion (Brief for Petitioner at 19-20), the requirement of Section 706(b) that a notice of charge be served upon a respondent does not imply that persons directly involved in the investigation are not members of the "public", even though Section 706(b) requires that charges not be made "public". The E.E.O.C. is required to serve only a notice of the charge, not a copy of the charge itself. Furthermore, service of the notice of charge upon the respondent fulfills due process requirements of notice and "constitutes an express exception to the non-disclosure provisions." *H. Kessler and Co.* v. *E.E.O.C.*, 468 F. 2d 25, 27 (5th Cir. 1972), *rev'd en banc* 472 F. 2d 1147, *cert. den.* 412 U.S. 939 (1973) (hereinafter referred to as "*Kessler* (panel decision)").

The Commission also argues that Section 706(b), which requires "the written consent of the persons concerned" prior to disclosure of conciliation information, indicates that parties participating in conciliation are not members of the public. (Brief for Petitioner at 20.) This contention also has no merit. That provision merely states that the party who actually supplied information during conciliation or engaged in discussion of settlement proposals cannot have such information or proposals used against him without his consent. The intent, obviously, is to encourage frank and meaningful discussions leading to a voluntary resolution of the alleged illegal practice. *Kessler* (panel decision), *supra*, 468 F.2d at 127. The contention that confidential information must be disclosed to a party who did not supply it so that the party's unnecessary consent to its further disclosure can be obtained is a fallacious reading of the statute.

[4] Since the meaning and intent behind the use of "public" in both Sections 706(b) and 709(e) are the same, there is no reason to construe the language in each provision differently. *Sears, Roebuck and Co.* v. *E.E.O.C., supra*, 581 F.2d at 948.

permitted *only* to the extent absolutely necessary for the E.E.O.C. to carry out its functions.

> [T]his is a ban on publicizing and not on such disclosure as is necessary to the carrying out of the Commission's duties under the statute. Obviously, the proper conduct of an investigation would ordinarily require that the witnesses be informed that a charge had been filed and often that certain evidence had been received. Such disclosure would be proper. The amendment is not intended to hamper Commission investigations or proper cooperation with other State and Federal agencies, but rather is aimed at the making available to the general public of unproven charges.

110 Cong. Rec. 12723 (1964). In discussing Section 706(b), Senator Dirksen stated that "maximum results" would be achieved by insuring that the "investigation and conciliation are carried on in privacy," with disclosure of any information occurring only "when a court suit is filed." 110 Cong. Rec. 8193 (1964).

There is no support in either of these statements for the E.E.O.C.'s disclosure rules which provide for the wholesale disclosure of confidential information in investigatory files (or *any* information in those files for that matter) to a charging party or his attorney. Rather, the entire thrust of these statements is to limit disclosure of investigative and conciliation information to the minimum amount necessary for the Commission to perform its duties—not to permit the E.E.O.C. to fuel the lawsuit of a private litigant. Thus, there is no support whatsoever in the legislative history for the E.E.O.C.'s disclosure rules.[5]

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[5] The Commission contends that the 1972 amendments to Title VII indicated Congressional approval of the Commission's interpretation of the non-disclosure provisions. Brief for Petitioner at

While the legislative history on Sections 706(b) and 709(e) is minimal, they fit within a pattern of legislation which Congress has enacted to protect businesses from public disclosure of confidential information which they are required to submit to the Government. *See, e.g.*, 18 U.S.C. §1905 (1976) (the "Trade Secrets Act" which protects information provided to the Government relating to "trade secrets" or "confidential" business data); 5 U.S.C. §552 (b)(4) (1976) (the "trade secrets" exemption to the FOIA); 15 U.S.C. §2055 (a)(2) (1976) (protection of trade secrets and confidential business information submitted to the Government under the Consumer Product Safety Act). *See also Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 n. 42 (1979). Moreover, "the federal courts have long recognized a qualified privilege for trade secrets and other confidential information." *Federal Open Market Committee of the Federal Reserve System* v. *Merrill*, 443 U.S. 340, 356 (1979). *See also Consumer Product Safety Commission* v. *GTE Sylvania, supra*, 100 S. Ct. at 1057-58; *E.I. duPont de Nemours Powder Co.* v. *Mosland*, 244 U.S. 100, 103 (1917).

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page 26 n. 15. The Senate bill would have amended Section 709(e) to prohibit disclosure of "any record or paper" required to be kept, except to Congress or government agencies or in a court proceeding. *See* S. Rep. No. 92-415, 92d Cong., 1st Sess. 67 (1971). This amendment was deleted without comment by the conference committee. It is a canon of statutory construction that "[a]ctions on proposed amendments are not significant aids to interpretation of an act that was passed years before." 2A C. Sands, *Sutherland on Statutes and Statutory Construction* §48.18 at n. 4.1 (4th ed. 1973 and 1979 Cum. Supp.). Moreover, "legislative inaction has . . . been called a 'weak reed upon which to lean' and a 'poor beacon' to follow in construing a statute." *Id.* at §49.10. It is a particularly poor beacon in this case where the proposed amendment was dropped without explanation or debate. *Sears Roebuck and Co.* v. *E.E.O.C., supra*, 581 F.2d at 947-48 n. 9. *See also Mohasco Corp.* v. *Silver, supra*, 23 FEP Cases at 7-8 on the unreliability of using statements of a subsequent Congress to infer the intent of an earlier one.

The policy reflected in these Congressional enactments is that individuals and businesses have a right to conduct their affairs in private. In such Acts, Congress acknowledged that unnecessary public disclosure of confidential business information could irreparably harm the company, whose only error may have been to cooperate with the Government. By restricting governmental disclosure of confidential business information in various statutes, Congress sought to establish "as a matter of policy, some balancing and accommodation" between the public's right to know and the individual's right to privacy. *Chrysler Corp.* v. *Brown, supra* at 293.

Within the last several years, this Court has also decided several cases involving the issue of government disclosure of confidential information under these statutes. *See, e.g., Consumer Product Safety Commission* v. *GTE Sylvania, supra; Federal Open Market Committee of the Federal Reserve System* v. *Merrill, supra; Chrysler Corp.* v. *Brown, supra; N.L.R.B.* v. *Robbins Tire and Rubber Co., supra; N.L.R.B.* v. *Sears Roebuck and Co., supra.* Each time, the Court recognized the importance of protecting confidential information from disclosure to persons outside the Government. For instance, in *Chrysler Corp.* v. *Brown*, this Court examined the disclosure rules of the Office of Federal Contract Compliance Programs ("OFCCP") and held that those regulations could not authorize disclosure of confidential business information by the Government in violation of the Trade Secrets Act.[6]

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[6] The data submitted by the employer in that case to the Defense Logistics Agency was strikingly similar to information that the E.E.O.C. has in its investigation files: information on employer compliance with equal employment opportunity laws and various manning tables. Since OFCCP is not a Title VII agency, Sections 706(b) and 709(e) were inapplicable. After deciding that the Trade Secrets Act applied, the Court remanded for a determination of whether the information involved was "confidential" within the meaning of the Act.

Sections 706(b) and 709(c) of Title VII must be examined with these Congressional and judicial concerns in mind; they should not be interpreted in a vacuum. When the words of these provisions and their legislative history are read in conjunction with these recurrent Congressional and judicial concerns, it is apparent that Congress has acted to prevent governmental disclosure of confidential business information to persons outside the government.

"Public" includes private persons directly interested in the investigation. The Commission's special disclosure rules for private persons involved in the processing of the charge are contrary to Title VII and should be invalidated.[7]

B. *Disclosure of Information From Investigatory Files Undermines the Legislative Purpose Behind Title VII.*

When Congress enacted Title VII to eliminate discrimination in employment, "cooperation and voluntary compli-

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[7] The history of the E.E.O.C.'s disclosure regulations indicate that it substantially revised its own interpretation of the non-disclosure provisions. In the first version of its disclosure practices in its rules of procedure, the Commission allowed "such earlier disclosures to the charging party, the respondent [and] witnesses . . . *as may be appropriate or necessary to the carrying out of the Commission's functions under the title* . . ." 30 Fed. Reg. 8407 (1965) (codified in former 29 C.F.R. §1601.20) (emphasis added). In 1977, however, the Commission amended this provision to provide for "such earlier disclosures to charging parties, or their attorneys, respondents or their attorneys, or witnesses *where disclosure is deemed necessary for securing appropriate relief.*" 42 Fed. Reg. 42022 (1977) (codified in 29 C.F.R. §1601.22). The subtle shift in emphasis from disclosure necessary for the Commission to perform its statutory functions to disclosure to secure "necessary relief"—including private lawsuits—should be noted. This undercuts the Commission's claim of consistency in interpreting its statute. *See also* 40 Fed. Reg. 8171 (1975) (codified as 29 C.F.R. §1610.17(d) [Commission regulation providing for special disclosure rules not promulgated until *1975.*]

Regardless, it is well established that the E.E.O.C.'s interpretation of Title VII "cannot supersede the language chosen by Congress." *Mohasco Corp.* v. *Silver, supra*, 23 FEP Cases at 8. *See also General Electric Corp.* v. *Gilbert*, 429 U.S. 125, 140-42 (1974).

ance were selected as the preferred means for achieving this goal." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). The structure of the Act itself bears witness to this. A charging party must first file his charge with the E.E.O.C. or a state or local authority, if it exists. Sections 706(b) and (c), 42 U.S.C. §2000e-5(b) and (c) (1976). The E.E.O.C. is given at least 180 days after the filing of the charge to investigate the charge, determine whether reasonable cause exists to believe the charge true, and engage in conciliation with the respondent in an attempt to achieve voluntary compliance. Section 706(b). If conciliation fails, the E.E.O.C. may bring suit in Federal court to achieve compliance. Section 706(f)(1), 42 U.S.C. §2000e-5(f)(1) (1976).

Even though a charging party may pursue a private lawsuit under Title VII if the E.E.O.C. has not filed a civil action within 180 days of the filing of the charge, *ibid.*, the primary means of achieving compliance with Title VII is through the efforts of the E.E.O.C. to obtain voluntary compliance. Senator Dirksen, in discussing the non-disclosure provisions in Title VII, stressed the need for voluntary compliance and conciliation: "The maximum results from the voluntary approach will be achieved if the investigation and conciliation are carried out in privacy." 110 Cong. Rec. 8193 (1964). Wholesale disclosure of investigative files runs counter to this statutory purpose.

Employer cooperation with E.E.O.C. investigations is discouraged since employers know that confidential business information will be publicly disclosed to charging parties and their attorneys long before any suit is filed.[8]

[8] The history of this case is a prime example. The information which the E.E.O.C. asked the Respondent to submit was highly sensitive. App. 40-42. Data on payroll and promotions would be invaluable to a competitor or a union in analyzing Respondent's pay structure, manning, and costs. Such information, as well as

An employer also finds it difficult to retain a conciliatory attitude toward the E.E.O.C. if the E.E.O.C. is encouraging private lawsuits by wholesale disclosure of confidential information to the charging party. Congress obviously did not intend the plain meaning of the non-disclosure provisions of Title VII to be circumvented by the Commission in such a manner as to undercut the keystone statutory purpose of conciliation and voluntary compliance. *See Burlington Northern, Inc.* v. *E.E.O.C.*, 582 F.2d 1097, 1100 (7th Cir. 1978); *Sears, Roebuck and Co.* v. *E.E.O.C.*, *supra*, 581 F.2d at 946; *Kessler* (panel decision), *supra*, 468 F.2d at 27.

By opening investigatory files to charging parties, the E.E.O.C. emphasizes an adversarial stance and encourages private litigation. This is entirely contrary to the E.E.O.C.'s duties as a neutral, objective investigator and conciliator. "[T]he E.E.O.C. does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment litigation and settling disputes, if possible, in an informal non-coercive fashion." *Occidental Life Insurance Co.* v.

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information on discipline, would seriously infringe upon the privacy rights of employees if it were publicly disclosed. Finally, disclosure of arrest records in the Security Department would not only publicly embarrass third parties, but also subject the Respondent to numerous lawsuits for libel and/or false arrest. Naturally, Respondent chose to seek protection for its confidential business information in the courts rather than to resign itself to the ramifications of public disclosure of information under the E.E.O.C.'s current rules.

Moreover, this dilemma is faced by all retailers under the E.E.O.C.'s disclosure rules. It is not surprising that three of the four Court of Appeals decisions regarding the disclosure rules have involved retailers. *Associated Dry Goods Corp.* v. *E.E.O.C.*, 607 F.2d 1075 (4th Cir. 1979); *Sears, Roebuck and Co.* v. *E.E.O.C.*, *supra; H. Kessler & Co.* v. *E.E.O.C.*, 472 F.2d 1147 (5th Cir.) (en banc), *cert. den.* 412 U.S. 939 (1973) (hereinafter referred to as "*Kessler* (en banc decision)").

E.E.O.C., 432 U.S. 355, 368 (1977). *See also Burlington Northern, Inc.* v. *E.E.O.C., supra,* 581 F.2d at 946. The disclosure rules, however, discourage conciliation and compliance, and constitute an abdication by the E.E.O.C. of its statutory duties. Contrary to the E.E.O.C.'s view, the nondisclosure provisions clearly demonstrate that the E.E.O.C. was not intended to function as a "private discovery tool". *Cf. N.L.R.B.* v. *Robbins Tire & Rubber Co., supra,* 437 U.S. at 242.

While a charging party has a right to sue privately if he chooses not to await the results of the Commission's efforts,[9] Title VII does not provide him with open access to confidential information in the Commission's files. If the private plaintiff pursues his independent remedy under Title VII, he is governed by the discovery rules of the Federal Rules of Civil Procedure, as is any other litigant. The private litigant may indeed request in pre-trial discovery confidential data which may be relevant to his case. But, the employer will be protected since the District Court may limit access to and disclosure of the information, with the power to enforce sanctions for breaches of confidentiality. *See, e.g.,* Federal Rule of Civil Procedure 26(e)(7). Requiring private parties to commence suit before obtaining any confidential information or investigative file data is a fair and equitable balance between enforcement of Title

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[9] Although suit by a private party is an important part of enforcing Title VII, it is separate and distinct from the functions of the E.E.O.C. The charging party has the option of letting the E.E.O.C. go to court to enforce his rights if "reasonable cause" is found, since "reasonable cause" is defined as having "sufficient merit to warrant litigation". E.E.O.C. Compliance Manual, §40.1. The existence of this private right of action, moreover, does not supplant the primary statutory purposes of voluntary compliance and conciliation. *See, e.g., Occidental Life Insurance* v. *E.E.O.C., supra* at 366.

VII rights and protection of the employer's interest in confidentiality.[10]

Thus, the E.E.O.C.'s disclosure rules run afoul of the legislative purpose behind Title VII. These rules also undercut the Commission's statutory function. They should be held invalid.

C. *Under Its Present Rules, the E.E.O.C. Is Unable and Unwilling to Prevent the Transmission of Confidential Information to Third Parties.*

As this Court has said in the context of the F.O.I.A., when employers submit confidential business information to an agency, "the submitters' interest in confidentiality [is protected] only to the extent that this interest is endorsed by the agency collecting the information." *Chrysler Corp.* v. *Brown, supra,* 441 U.S. at 293. This point underscores the fallacy in the E.E.O.C.'s contention that the non-disclosure agreement which a charging party or his attorney signs to obtain access to an investigatory file is an effective deterrent to the disclosure of confidential information. Not only is the agreement a poor substitute for non-disclosure, but the E.E.O.C.'s capricious approach

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[10] Contrary to the Commission's assertion, private parties will not be crippled in enforcing their rights under Title VII if they are not permitted wholesale access to investigatory files. The concerns for the private plaintiff that the Fifth Circuit had in *Kessler* (en banc decision), *supra,* 472 F.2d at 1152-53, have been largely addressed by the 1972 amendments to Title VII. Federal courts are empowered to appoint an attorney for a Title VII plaintiff. Allowing the private plaintiff attorney's fees for actions and proceedings militates against delay on the part of the employer in either administrative proceedings or pre-trial discovery. *New York Gaslight Club, Inc.* v. *Carey, supra.* Finally, since the time a plaintiff has to bring suit was expanded from 30 days to 90 days, plaintiffs are provided adequate time to draft even the barest bones of a complaint. *See, Sears, Roebuck and Co.* v. *E.E.O.C., supra,* 581 F.2d at 947-48.

to the safeguarding of confidential information provides employers with absolutely no protection.

A glance at the record in this case indicates the sensitive and confidential business information which the E.E.O.C. seeks—information which it will freely turn over to a charging party without regard to protecting the employer's interest in its confidentiality. The agency subpoena (App. 40-42) sought such data as payroll records, promotion records, other confidential personnel information, and detailed records of arrests made by store security personnel. Public disclosure of any of this information would cause immediate harm to the employer's business. Employee morale would certainly suffer if employees realized that information regarding salaries, promotions, and disciplinary action taken against them would be made public.[11] Competitors and pressure groups could use payroll, promotion, staffing, and other personnel information in a manner detrimental to the employer's business. Selective portions of confidential information could be publicized in a way intended to put the employer unjustifiedly in a bad light or to exert undue influence on him. Loss of customers and sales could result. Disclosure of information such as records of arrests by store security personnel would not only embarrass third parties but could also subject the employer to civil suits.

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[11] In a survey of public attitudes undertaken by Louis Harris and Associates and Professor Alan F. Westin of Columbia University, it was found that 58% of those surveyed expressed concern that the federal government would misuse data that it collects on individuals. 41% of those polled felt that "government welfare agencies" should be doing more to protect the confidentiality of personal information which they collect. 32% stated that "government welfare agencies" ask for too much information on individuals. *The Dimensions of Privacy* (privately printed by the Sentry Insurance Company, Stevens Point, Wis., 1980), at 26-29, 66, 71.

Although the E.E.O.C. asserts that it is not aware of a single instance in which a charging party has transmitted information in violation of the non-disclosure agreement (Brief for Petitioner, page 37 at n. 24), it introduces no proof to support such a bold statement. Furthermore, charging parties often support organizations which have an adversary attitude toward the employer. To imply, as the E.E.O.C. does, that a charging party has *never* transmitted confidential information supplied by an employer to a third party ignores reality. Because of the charging party's adversarial position and frequent ties to outside interests, "there are many times when the charging party may be the very person to whom a company most fears pre-suit release of information." *Kessler* (panel decision), *supra,* 468 F.2d at 27.[12] In fact, the negligent disclosure by the E.E.O.C. of information regarding all the charges in this case to an attorney who represented some of the charging parties and various unions who negotiate contracts with the Respondent provided the Respondent with serious and legitimate cause for alarm. App. 29-30, 69-70.

The non-disclosure agreement which individuals sign when they are given access to open investigatory files offers no protection to employers at all. While, *arguendo*, it may provide an employer with a cause of action as a third party beneficiary,[13] injunctive relief after disclosure is a wholly inadequate remedy. *Sears, Roebuck & Co.* v. *E.E.O.C., supra,* 581 F.2d at 946-47. Moreover, while damages from disclosure are tangible and real, they are difficult to mea-

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[12] *See, e.g. Kessler* (panel decision), *supra,* 486 F.2d at 27, where the panel of the Court of Appeals stated that the employer's fears of transmission of confidential information by the charging party were "well-founded as we view the record."

[13] Since the E.E.O.C. has admitted that it has never sought enforcement of a non-disclosure agreement, its enforceability is unproven and questionable. *Sears, Roebuck and Co.* v. *E.E.O.C., supra,* 581 F.2d at 146-47.

sure, transcending monetary compensation. The employer cannot easily be recompensed for loss of his competitive position, damage to his business, and loss of customers. Similarly, the lack of meaningful penalties for disclosure provides no incentive to avoid disclosure. *Cf. Snepp* v. *U.S.*, 100 S. Ct. 763, 768 (1980). Non-disclosure of investigatory file information to private parties or other members of the public is a "prophylactic rule" which is infinitely preferable to ineffectual and hypothetical post-disclosure sanctions. *N.L.R.B.* v. *Robbins Tire & Rubber Co., supra,* 437 U.S. at 239-40.

Finally, the current attitude of the E.E.O.C. toward disclosure of investigative data and confidential business information underlines its unwillingness to recognize the problem or act to protect the employer's interest. Ingrained agency hostility and the lack of an effective measure to prevent transmission of confidential information are fatal flaws in the E.E.O.C.'s disclosure rules.

D. *The E.E.O.C.'s Functions Will Not Be Handicapped by Compliance With the Statutory Mandate of Title VII.*

The E.E.O.C. argues at length that unfettered disclosure of investigatory and conciliation information to persons interested in the investigation is absolutely vital to its operation. Brief for Petitioner at pages 28-44. While an argument of administrative efficiency is not enough to overcome a statutory prohibition,[14] the E.E.O.C. seeks to blur the distinction between disclosure necessary for it to fulfill its statutory duties and disclosure which it feels is helpful to a private party's lawsuit. *See* note 7, *supra.*

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[14] As this Court has stated, "[T]he existence of a prior administrative practice, even a well-explained one, [does not] relieve us of our responsibility to determine whether that practice is consistent with the agency's statutory authority." *S.E.C.* v. *Sloan,* 436 U.S. 103, 117 (1978). *See also Chrysler Corp.* v. *Brown, supra,* 441 U.S. at 304, 308.

It is interesting to note that other Federal agencies do not find it necessary to provide private parties with broad access to open investigatory or conciliation files in order to carry out their statutory duties of investigation and prevention. The National Labor Relations Board, for instance, has taken the position that disclosure of any open investigatory files would hinder its statutory duties to investigate and remedy unfair labor practices. 29 C.F.R. §102.117(d). This Court upheld the N.L.R.B.'s position in *N.L.R.B.* v. *Robbins Tire & Rubber Co., supra.*[15]

Both the Occupational Safety and Health Administration (O.S.H.A.) and the Wage and Hour Division of the Department of Labor (W.H.D.) do not allow interested persons access to open investigatory files. 29 C.F.R. §70.27. Both agencies also restrict access to closed files if they contain confidential business information. 29 C.F.R. §§70.21, 70.24. This is especially significant in the case of the W.H.D., since an employee has a private right of action under the Fair Labor Standards Act. 29 U.S.C. §216(b) (1976). None of these agencies claim that they are handicapped in the performance of their duties by the lack of wholesale disclosure of investigative files to parties or other individuals.

Rather, it is only the E.E.O.C. which makes this claim. The legislative history of Section 709(e) indicates that the E.E.O.C. is not precluded from making minimal disclosures of information to interested persons when abso-

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[15] While it may be argued that private parties do not have a right of action under the National Labor Relations Act, certain unfair labor practices may also provide a party with a private right of action under Section 301 of the Taft-Hartley Act, 29 U.S.C. §185 (1976). For instance, an employee may sue to remedy a breach of the duty of fair representation by an employer and a union even though such a breach is also a violation of the National Labor Relations Act. *Vaca* v. *Sipes,* 386 U.S. 171 (1967).

lutely necessary to investigate a charge. As the Fourth Circuit pointed out below (607 F.2d at 1077), the Commission could effectively function by disclosing the least amount of information necessary, and by camouflaging sources and unnecessary details as much as necessary. Clearly, it is possible to obtain the statements of parties and witnesses without discussing or revealing unnecessary information.

Moreover, the E.E.O.C.'s effectiveness would be enhanced since employers would not object to supplying confidential information if there were meaningful guarantees of non-disclosure. Employers would be more willing to engage in frank and meaningful discussions in fact-finding conferences and conciliation, since they would be assured that their business information would not be compromised. Rather than increasing the Commission's caseload, there would be more of a tendency to settle matters before positions formalized. This would be quite unlike the present situation, where employers feel compelled to obtain court protection for confidential information provided to the E.E.O.C. *Sears, Roebuck & Co.* v. *E.E.O.C., supra,* 581 F.2d at 947.

The language, history and purpose of Sections 706(b) and 709(e) require that confidential business information which an employer submits to the E.E.O.C. be kept confidential. Investigatory and conciliation files are not to be disclosed to members of the public—including parties and witnesses. The purposes of Title VII would be furthered by non-disclosure. The E.E.O.C.'s disclosure rules not only override the clear mandate of the statute, but are also wholly superfluous to the duties and functions of the E.E.O.C. The disclosure rules violate Title VII and are invalid.

II.

The E.E.O.C.'s Disclosure Rules Violate Other Statutory Provisions.

A. *Disclosure of Confidential Business Information to Private Persons Involved in the Investigation Violates the Trade Secrets Act.*

Although the majority decision below did not reach the issue of the applicability of the Trade Secrets Act, 18 U.S.C. §1905 (1976), the Respondent did allege in its complaint and appeal that E.E.O.C. disclosure of confidential information in investigatory and conciliation files violates the Trade Secrets Act as well as Title VII and is actionable under the Administrative Procedure Act. App. 10-11. *See also Associated Dry Goods Corp.* v. *E.E.O.C.*, 607 F.2d 1075, 1079 n. 3 (4th Cir. 1979). Under this Court's decision in *Chrysler Corp.* v. *Brown, supra*, it is clear that the E.E.O.C.'s disclosure rules violate the Trade Secrets Act as well.

In *Chrysler Corp.* v. *Brown,* one of the issues was whether the disclosure rules of OFCCP permitting disclosure of various work force data contravened the Trade Secrets Act. The question turned on whether the regulations permitting disclosure of such sensitive information were "authorized by law" as an exception to the non-disclosure provision of Section 1905. Since the disclosure rules were enacted pursuant to an Executive Order, the Court did not find the legislative authorization necessary to issue such rules.

This Court's decision in *Chrysler Corp.* v. *Brown,* mandates that the E.E.O.C.'s disclosure rules be held in violation of Section 1905. As Point I, *supra,* sets out at length, Title VII prohibits *any* public disclosure, includ-

ing disclosure and resolution of the charge. Assuming *arguendo* that charging parties or their attorneys are not considered members of the "public" for purposes of the non-disclosure provisions of Title VII, the statute, nevertheless, does not affirmatively authorize disclosure of confidential business information to charging parties by the Commission. Indeed, the non-disclosure provisions strongly suggest the reverse.

As discussed in Point I. C, *supra*, the information requested by the Commission is often sensitive and extremely confidential business information, reflecting general payroll data, compensation of key personnel, costs, sales, profitability and other economic and personnel matters. Such information clearly concerns "operations" and relates to "confidential statistical data, amount or source of any income, profits, losses or expenditures of any person, firm, partnership, corporation or association" as is required by Section 1905.[16] Moreover, the Commission itself has put its officers and employees on notice of the applicability of Section 1905 to its work. 29 C.F.R. §1600.735-205(f)(b).

Thus, apart from the non-disclosure provisions of Title VII, the Trade Secrets Act prohibits the Commission from releasing confidential business information in its files to any private persons involved in the charge. The disclosure rules permitting such disclosure should be set aside as being contrary to law within the meaning of the Administrative Procedure Act, 5 U.S.C. §706(2)(A) and (C) (1976).

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[16] The existence of non-disclosure provisions in Title VII does not preclude the application of Section 1905 to the Commission. As demonstrated in Title VII itself, Congress often provides distinct but parallel statutory remedies to prevent or redress a wrong. *See, e.g. Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

B. *The E.E.O.C.'s Disclosure Rules Are Substantive Rules, and as Such, Exceed Its Statutory Authority.*

In *Chrysler Corp.* v. *Brown, supra,* in examining the regulations of OFCCP permitting disclosure of various equal employment data (41 C.F.R. §§60-40.2 to 60-40.4), this Court held that such disclosure regulations were "substantive" agency regulations within the meaning of the Administrative Procedure Act, 5 U.S.C. §553 (1976). *Id.*, 441 U.S. at 301-03. As such, they were subject to the notice and comment rulemaking procedure of the Administrative Procedure Act. *Id.* at 312-16.

The regulations at issue in this case are strikingly similar to the regulations in *Chrysler Corp.* They authorize disclosure of confidential business information which reflects the equal employment practices of the employer. Both sets of regulations permit disclosure of this information to individuals outside the Government. While the regulations in *Chrysler Corp.* permitted disclosure to both interested private persons and members of the general public, the information in question here is much more sensitive and detailed.[17] Following that Court's reasoning, the E.E.O.C.'s disclosure regulations "certainly affect individual rights and obligations", by governing "the public's right to information" in investigative files and "the con-

[17] This is not to say that disclosure under the regulations in *Chrysler Corp.* constitutes "public" disclosure, while disclosure under the Commission's regulations is not. Disclosure to any non-governmental entity is "public" disclosure. Nor does the type of information disclosed determine who is a member of the "public". The fact that a charging party may view an investigatory file compiled on *his* charge does not transform his standing as a member of the "public". "[C]onceptually, . . . the definition of public ought to turn on who is to receive the information rather than how much may appropriately be given the recipient." *Burlington Northern, Inc.* v. *E.E.O.C., supra,* 582 F.2d at 1100-01. *See also N.L.R.B.* v. *Robbins Tire and Rubber Co, supra,* 437 U.S. at 242 n. 23 (1978).

fidentiality rights of those who submit information" to the E.E.O.C. *Id.*, 441 U.S. at 303.

The E.E.O.C. promulgated its substantive agency disclosure rules without adhering to the procedural requirements of the Administrative Procedure Act, 5 U.S.C. §553. The provision providing for "special disclosure rules" for interested individuals was promulgated without explanation, public hearings or opportunity for public comment. 40 Fed. Reg. 8171 (1975). *See also* note 7, *supra*. Accordingly, the disclosure rules were not promulgated according to law. 42 U.S.C. §2000e-12(a); *Chrysler Corp.* v. *Brown, supra,* 441 U.S. at 312-16; *Chamber of Commerce of the U.S.A.* v. *O.S.H.A.*, No. 78-2221 (D.C. Cir., July 10, 1980).

A more serious problem with the regulations is contained in Title VII itself. Section 713(a) of Title VII gives the E.E.O.C. authority to issue *only* procedural regulations. 42 U.S.C. §2000e-12(a) (1976). It is well established that the Commission does not have authority to promulgate substantive rules and regulations. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 431 (1975); *General Electric Co.* v. *Gilbert,* 429 U.S. 125, 141 (1976). Since the disclosure regulations of the E.E.O.C., however, are substantive, *Chrysler Corp.* v. *Brown, supra,* 441 U.S. at 303, it is evident that the Commission exceeded its authority in promulgating such rules. The rules at issue in this case, then, are illegal and may not be applied by the E.E.O.C.

CONCLUSION

For these reasons, the judgment of the Fourth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1979

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ASSOCIATED DRY GOODS CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1068

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ASSOCIATED DRY GOODS CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT

The Equal Employment Advisory Council (EEAC), with the written consent of all parties, respectfully submits this brief as Amicus Curiae in support of the Respondent.[1]

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad

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[1] Their consents have been filed with the Clerk of the Court.

segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially, all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*). As such, EEAC's members have a direct interest in the issue presented for the Court's consideration; that is, whether Sections 706(b) and 709 (e) of Title VII prohibit the Equal Employment Opportunity Commission (the Commission or EEOC) from disclosing information obtained during its investigation of a charge to charging parties, their attorneys or other persons outside the government prior to the institution of a court suit.[2]

STATEMENT OF THE CASE

Several employees of Joseph Horne Company, a subsidiary of Associated Dry Goods Corporation (Associated), filed charges alleging race and sex discrimination between 1971 and 1973. The Commission's investiga-

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[2] Because of its interest in issues involving the disclosure of business information, EEAC filed a brief as Amicus Curiae in this Court in *Chrysler Corp.* v. *Brown*, 99 Sup. Ct. 1705 (1979); the District of Columbia Circuit in *Sears, Roebuck & Co.* v. *EEOC*, 581 F.2d 941 (D.C. Cir. 1978); and the court below. EEAC also has filed amicus curiae briefs in other equal employment cases before the Court. *See, e.g., International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977); and *Great American Federal Savings & Loan Association* v. *Novotny*, 99 Sup. Ct. 2345 (1979).

tion of those charges included serving wide-ranging interrogatories on Horne (Jt. App. 19-21) seeking information about its employment practices, including confidential business information. Horne sought assurances from the EEOC that its answers would not be disclosed to the charging parties, their attorneys, or others. Adhering to its disclosure rules, 29 C.F.R. §§ 1601.22 and 1610.17(d), and special disclosure rules found in Section 83 of its Compliance Manual,[3] the EEOC refused to give such assurances. As found by the district court, the EEOC "explained that its policy was to disclose to charging parties both their own case files (including data submitted by the employer in response to Commission interrogatories) and 'related case files'—files involving the same employer which were compiled during the investigation of similar charges filed by other individuals." Pet. App. 17a. Consequently, Horne refused to answer the interrogatories and the Commission thereafter subpoenaed the data sought in them. Subsequently, Associated brought suit in district court challenging the EEOC's disclosure regulations and seeking injunctive relief. Agreeing with the District of Columbia Circuit's reasoning in *Sears, Roebuck & Co.* v. *EEOC*, 581 F.2d 941 (D.C. Cir. 1978), the district court ruled that the EEOC's disclosure regulations were invalid and unenforceable to the extent that they authorize disclosure to charging parties, their attorneys or others outside of government prior to the institution of a court suit under Title VII. The Fourth Circuit affirmed the ruling and rationale of the district court.

The EEOC petitioned for and this Court granted *certiorari* on the issue of whether information obtained during investigation of a charge may be disclosed to the parties immediately involved in the charge. Amicus agrees with the Respondent that, in phrasing the dis-

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[3] The texts of these rules are found in Petitioner's Brief for Certiorari 3-4 and Appendix E, 33a-44a.

closure issue, the government has improperly narrowed the issue before this Court to the facts of this particular case, because in the courts below the Commission sought to uphold its disclosure regulations in their entirety. See Respondent's Brief in Opposition to Certiorari 5-7. Rather, we believe the issue is as phrased in our statement of interest (see p. 2, *supra*) and in Associated's Opposition to Certiorari and Brief.

SUMMARY OF ARGUMENT

The statutory language and legislative history of Section 709(e) of Title VII support the conclusion of the court below and the District of Columbia and Seventh Circuits that Section 709(e) precludes pre-suit disclosure by the EEOC of information from its investigative files to members of the public, including charging parties, their attorneys and others outside of government. Pet. App. 1a-7a; *Sears, Roebuck & Co.* v. *EEOC*, 581 F.2d 941 (D.C. Cir. 1978); and *Burlington Northern, Inc.* v. *EEOC*, 582 F.2d 1097 (7th Cir. 1978). The government's attempted distinction between disclosing investigative information to charging parties and their attorneys and "making public" such information is illusory because: (1) the Commission itself treats charging parties as members of the public under the Freedom of Information Act; (2) a charging party is a member of the public with respect to discrimination charges filed by others; and (3) the EEOC has no effective way of precluding a charging party from disseminating information to the public once it is received.

As both the *Sears* and *Burlington* decisions recognize, to permit disclosure of information from the Commission's investigative files to charging parties would "encourage the filing of private lawsuits" in derogation of the Commission's role as the principal enforcer of Title VII rights and "undercut the preferred enforcement scheme of comprehensive negotiation and settlement" through the Commission's offices. 582 F.2d at 1100.

Accord, Sears, 581 F.2d at 946. The only court of appeals holding to the contrary—the Fifth Circuit's decision in *H. Kessler & Company* v. *EEOC*, 472 F.2d 1147 (1973) (en banc), *cert. denied*, 412 U.S. 939 (1973)—was specifically considered and rejected by both the District of Columbia and Seventh Circuits, in part because it took no account of these problems inherent in the Commission's disclosure policy. The government now urges this Court to adopt the discredited *Kessler* rationale, but offers no satisfactory answers to the problems pointed out by other circuits in *Sears* and *Burlington*. The fact remains that voluntary cooperation and conciliation will be severely undermined if information obtained by the Commission can be disclosed freely to persons or organizations who may then institute their own Title VII suits against the employer that supplied it.

By granting charging parties access to investigative file materials, the Commission's regulations grant them unwarranted discovery rights not justified by the plain meaning of Section 709(e). In doing so, these regulations preclude employers from obtaining protective orders limiting the scope of discovery under the Federal Rules of Civil Procedure Rule 26(c). The importance of this procedural protection cannot be minimized, because responses to Commission interrogatories, alone and in conjunction with EEO-1 reports, contain confidential business information whose disclosure could result in severe competitive harm in many instances. Furthermore, because neither Section 709(e) nor the Commission's disclosure regulations constitutes "authori[zation] by law" for the disclosure of confidential commercial information, the Commission's disclosure policies violate the Trade Secrets Act.

ARGUMENT

I. THE EEOC'S DISCLOSURE REGULATIONS ARE IN CONFLICT WITH THE PUBLIC DISCLOSURE AND SETTLEMENT POLICIES OF TITLE VII

A. Section 709(e) of Title VII Precludes Disclosure of Information to Charging Parties Prior To Their Instituting a Court Suit

Section 709(e) of Title VII states without qualification regarding the disclosure of information obtained during the investigation of a charge of discrimination:

> It shall be unlawful for any officer or employee of the Commission *to make public in any manner whatever* information obtained by the Commission pursuant to its [investigative and recordkeeping] authority under this section prior to the *institution of any proceeding* under this title involving such information. 42 U.S.C. § 2000e-8(e) (emphasis added).

As recognized by the court below, the wording chosen by Congress in enacting Section 709(e) could hardly have made more explicit Congress's intent to prohibit all prelitigation disclosure of materials obtained by the Commission in investigating charges under Title VII. See Pet. App. 7a; *Sears*, 581 F.2d at 948-49; and *Burlington*, 582 F.2d at 1100. The prohibition is stated unequivocally, without ambiguity or reservation. Such information is not to be made public to anyone outside government "in any matter whatever".

Because the language of Section 709(e) is unambiguous and broadly encompassing, it is unnecessary to search for its meaning beyond the words themselves. Congress intended the ban on disclosure to be applied literally to prevent the EEOC from turning over any materials from its investigative files to anyone outside the government prior to conciliation and litigation. Most significantly, as the District of Columbia Circuit recognized, Congress enacted Section 709(e) in the context

of a well-established practice throughout the government of forbidding disclosure of investigatory materials even to private litigants. *Sears*, 581 F.2d at 947. As that court noted, the policy uniformly followed by agencies such as the National Labor Relations Board and Department of Justice had been to refuse to provide private parties with such information except when faced with "some express statutory authorization or requirement to do so." *Id.*[4] Since Congress, in the context of this prevailing policy, chose to include no express disclosure authorization in Title VII, but rather to include the sweeping ban on disclosure set forth in Section 709 (e), it cannot be assumed that Congress intended the EEOC to follow a more liberal disclosure policy than these other agencies.

The Commission, nevertheless, seeks to justify its departure from the literal requirements of Section 709(e)

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[4] *See NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978). The Commission itself recognizes the correctness of this principle as is reflected in its recent amendment to its Freedom of Information Act regulations (29 C.F.R. § 1610.17(f)) relating to the disclosure of investigatory records under the Equal Pay and Age Discrimination in Employment (ADEA) Acts:

> (f) Requests for information relating to open case files covering alleged violations of the Equal Pay Act (29 U.S.C. 206(b)) or the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 *et seq.*) will ordinarily be denied under the seventh exemption of the Freedom of Information Act as investigatory records compiled for law enforcement purposes. 45 Fed. Reg. at 40605 (June 16, 1980).

Unlike Title VII, the Equal Pay Act and the ADEA do not have specific prohibitions against disclosure of investigatory data, yet EEOC refuses to turn over such materials to the public or charging parties. EEOC's policy of disclosure in this case, therefore, is in direct contradiction to its position with respect to these other statutes.

by relying heavily on a single passage from the legislative record in which Senator Humphrey comments on Sections 706(b)[5] and 709(e):

> *Fourteenth.* Provisions preserving the confidentiality of Commission procedure have been added to Sections [706(b)] and 709(e). Section [706(b)] provides that a charge filed with the Commission shall not be made public and provides a criminal penalty for a Commission employee who violates this rule. Section 709(e) prohibits the Commission and its employees from making public information obtained by compulsory process in the course of its investigation *except in the course of litigation* arising under the title.
>
> It should be noted that this is a ban on publicizing and not on such disclosure *as is necessary to carrying out of the Commission's duties* under the statute. Obviously, the proper conduct of an investigation would ordinarily require that the witnesses be informed that a charge had been filed and often that certain evidence had been received. Such disclosure would be proper. The amendment is not intended to hamper Commission investigations or proper cooperation with other State and Federal agencies, but rather is aimed at the making available to the general public of unproven charges. 110 Cong. Rec. 12723 (1964) (emphasis added).

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[5] In addition to mandating EEOC conciliation efforts following a "reasonable cause" finding, Section 706(b) provides in relevant part that:

> Nothing said or done during and as part of such informal [methods of conference, conciliation, and persuasion] may be made public by the Commission, its officers, or employees, or used as evidence in a subsequent proceeding without the written consent of the person concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. 42 U.S.C. § 2000e-5(b).

This solitary remark, however, falls far short of justifying the Commission's policy of unrestricted disclosure of investigative file materials to charging parties. Senator Humphrey's specific concern was only that the absolute ban on publicizing not affect disclosure *necessary to carry out the EEOC's duties*, giving as examples very limited forms of disclosure—informing witnesses that "a charge had been filed . . . [or] that certain evidence had been received." *Id.* Such notification, he observed, would have to be made so as not "to hamper Commission investigations." [6] Significantly, there is no indication in Senator Humphrey's statement that disclosure of the substance of evidence obtained by the Commission during the course of its investigation would be necessary or proper. Thus, his comments, viewed in context are fully consistent with the overall Congressional intent that "investigation and conciliation [be] carried out in privacy." 110 Cong. Rec. 8193 (1964) (remarks of Senator Dirksen).

The limited disclosure foreseen as necessary by Senator Humphrey hardly authorizes EEOC's broad disclosure provisions. The effective and efficient conduct of an investigation does not require the complete or partial disclosure of documents. It strains credulity to believe that an investigation or a realistic view of the facts by the parties during conciliation requires more than indirect disclosure of the substance of documents. It therefore seems inconceivable that the present investigations of the Commission, including its fact finding conferences, are not already being performed in accordance with the

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[6] Service of a charge is now mandated by the Act (Section 706(b)) and "to that extent constitutes an express exception to the nondisclosure provisions, and nothing which is a mere recitation of that which [the charging party] himself originated could constitute a disclosure or publication." *H. Kessler & Co.* v. *EEOC*, 468 F.2d 25, 27 (5th Cir. 1972) (panel decision).

suggested procedure of the court below, which procedure involves no disclosure of evidence at all.[7] The Fourth Circuit's procedure permits information to be corroborated or challenged in a manner not inconsistent with legislative intent and with no diminution in the effectiveness of EEOC's procedures.[8]

Since Section 709(e) precludes the disclosure of documents during an investigation—one of EEOC's specified duties under Title VII—it clearly prohibits the wholesale disclosure of the contents of an investigative file to charging parties who may be contemplating litigation. In the context of Senator Humphrey's statement this conclusion is particularly self-evident, because Title VII provides no explicit role for the EEOC relative to a charging party's decision to file or not file a law suit. Since the EEOC has no duty regarding a private litigation decision, Section 709(e) clearly provides no authority for the disclosure of investigative files to charging parties who are contemplating a court suit. The language of Section 709(d) demonstrates, furthermore, that when Congress wanted to authorize disclosure of information under Title VII, it knew how draft legisla-

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[7] In response to EEOC's contention that the prohibition on disclosure would unduly restrict its ability to corroborate evidence during an investigation, the Fourth Circuit stated:

> We think that such corroboration may easily be obtained without violating the statutory restrictions by interrogating those employees on the basis that "it has been said" or "it has been reported" without providing them with letter and verse of the employer's contentions or the specific identity of the representative of the employer advancing the contention. Pet. App. 6a.

[8] Moreover, since there needs to be a reasonable basis for requesting a witness to authenticate a document—that is, that the witness has knowledge of its contents—revealing the contents of the document to an authenticating witness hardly constitutes disclosure.

tion which unequivocally authorized disclosure.[9] In sum, the only tenable conclusion based on the legislative history and statutory language is that "Congress in enacting Section 709(e) had in mind the common prohibition against giving investigatory information to individuals outside the government." *Sears*, 581 F.2d at 947.

B. Disclosure to Charging Parties Constitutes Disclosure to the Public Within the Meaning of Section 709(e) of Title VII

Notwithstanding the unambiguous and broad nondisclosure prohibition in Section 709(e), the Commission's regulations unlawfully create an unwritten exception to Section 709(e) for the benefit of persons or organizations (and their counsel) who have filed charges under Title VII. The central premise of the government's argument is that disclosing information to charging parties and their attorneys is somehow materially different from "making public" that information within the meaning of the statutory prohibition. The purported distinction is illusory. Its argument necessarily rests on the incongruous premise that charging parties and their attorneys are not members of the public, a premise that the circuit courts in both *Sears* (581 F.2d at 946) and *Burlington* (582 F.2d at 1100) recognized as untenable, and which is implicit in the holding of the court below.

Indeed, the EEOC itself treats charging parties as members of the public with regard to its own investigative materials. This policy is most clearly evidenced by the provisions in Section 83.6 of the EEOC Compliance Manual which provide for the "expunction" of intra- and inter-agency memoranda including the investigator's

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[9] Section 709(d) provides in relevant part:

> The Commission *shall furnish* upon request . . . to any State and local [fair employment practice] agency . . . information obtained pursuant to [its recordkeeping requirements]. 42 U.S.C. § 2000e-8(d) (emphasis added).

memorandum and records concerning intra-governmental advisory and deliberative communications. (Jt. App. 39a-41a). Under the Freedom of Information Act (FOIA), the Commission has discretion to exempt such materials from the otherwise mandatory disclosure provisions of the Act. 5 U.S.C. § 552(b) (5) and b(7).[10] But in its brief, the government, argues that "[t]he plain meaning of the term [public], however, encompasses only those persons who have no particularized interest in the dispute", asserting that the legislative development of FOIA is instructive in establishing this faulty proposition.[11] Pet. Br. 19 n.11. The Commission's two positions are inconsistent. It contends in its brief that because charging parties do have a particularized interest in the matter they *are not members of the public* and consequently are not subject to the mandatory nondisclosure prohibition of Section 709(e). On the other hand, even though they do have this particularized interest, they *are members of the public* for purposes of FOIA and its nine permissive exemptions.

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[10] *See Chrysler* v. *Brown*, 99 Sup. Ct. 1705 (1979) (The nine exemptions to public disclosure of identifiable records under FOIA are permissive); *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) (investigatory files of enforcement agencies are not subject to public disclosure); and *EPA* v. *Mink*, 410 U.S. 73 (1973) (inter- and intra-agency memorandum are not subject to public disclosure.)

[11] In *Charlotte-Mecklenburg Hospital Authority* v. *Perry*, 571 F.2d 198, 202 (4th Cir. 1978)—a case involving an employer pre-suit request for sworn statements taken by the Commission from charging parties during an investigation—the EEOC argued that under the Freedom of Information Act "an interested party, such as the Hospital in this case, has rights under the Act as any other member of the public." This position is in direct conflict with the Commission's position herein and its special disclosure regulations in the Compliance Manual.

Significantly, this inconsistency manifests itself in EEOC's special disclosure regulations with respect to documents and evidence submitted by the parties during an investigation. Section 83.2 of the EEOC Compliance Manual (Pet. App. 33a-34a) creates an exception to disclosure for all persons including charging parties when the Commission is a party to the litigation, and relies on its public disclosure regulations (29 C.F.R. §§ 1610.30-1610.36) to handle requests for information from case files from charging parties and others. Thus, in circumstances where the EEOC has initiated the court suit, the EEOC treats charging parties as members of the public even though "[the] aggrieved person may intervene in the EEOC's enforcement action." *General Telephone Co.* v. *EEOC*, 99 Sup. Ct. 1698, 1704 (1980).

The illogic of the Commission's position is even more evident when one considers the diametrically opposed disclosure policies under Section 709(e) and FOIA and how the Commission has implemented them. Under FOIA, the presumption is in favor of disclosure to the public, while under Section 709(e) the presumption is to preclude such disclosure. Yet EEOC has designed a restrictive disclosure policy as to government memoranda that may be released under FOIA and a liberal disclosure policy for documents provided by persons outside of government during an investigation under a statutory provision whose manifest purpose is to establish an absolute ban on such disclosure to the public including charging parties.

The Commission's interpretation of Title VII is further undercut by its policy of permitting all charging parties with "related" or "similar" charges against the same employer to have access to all of the investigatory files in question. EEOC Compliance Manual § 83.7(c); Pet. Br. 31. Even assuming, *arguendo*, that a charging party is not a member of the public with respect to his own charge, that party is clearly a member of the public with respect to someone else's charge, particularly where the

factual context of the charges may be quite different. Here, for example, only one of the seven charges involves an allegation of race discrimination, but all seven were consolidated for investigation.[12] Under the Commission's disclosure regulations, all seven charging parties would have access to the same investigative files, which may contain documents and information unrelated to their charge.[13] Moreover, even in circumstances where a single charge is involved, disclosure to a charging party would nevertheless be tantamount to making the information public. *Sears*, 581 F.2d at 946-947.

Although the Commission now contends that the informal EEOC nondisclosure agreement (Jt. App. 59) is an enforceable contract, the EEOC admitted before the trial court that it has "no way of preventing charging parties from transmitting information they have to others." Pet. App. 17a-18a.[14] The two courts of appeals

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[12] The fact that the Commission consolidated these charges as a matter of administrative convenience illustrates the difficulty of drawing the line as to the breadth of disclosure and the fallacy of the EEOC's attempt to argue that this case is different from *Sears* and *Burlington Northern* because individual and not systemwide charges are involved. See pp. 19-20, *infra*.

[13] As has been noted and as will be discussed in more detail below (see p. 23-24, *infra*), the Commission's interrogatories were extremely broad and did not distinguish between those interrogatories pertinent to the race versus the sex discrimination charges. Thus, giving access to such files to individual plaintiffs would reveal to them information that would cover subject areas far beyond their individual claims. See also EEOC Compliance Manual § 83.7(c).

[14] *See also H. Kessler & Co.* v. *EEOC*, 53 F.R.D. 330, 340 (D.Ga. 1971), *aff'd*, 468 F.2d (5th Cir. 1972), *rev'd in part*, 472 F.2d 1147 (5th Cir. 1973) (en banc), *cert. denied*, 412 U.S. 939 (1973). Although the government maintains that the EEOC has consistently interpreted Section 709(e), it *has not*

that have considered the question of the enforceability of the nondisclosure agreements have recognized specifically that such informal promises obviously are not enforceable against those receiving the information" and, more generally, that "Title VII provides no effective means to limit distribution of the investigatory material to charging parties alone." *Sears*, 581 F.2d at 946. *Accord, Burlington*, 582 F.2d at 1100 n.6. The concerns of those courts were prompted not by evidence that charging parties might intentionally misuse the materials at issue, but by the fact that continued confidentiality of disclosed information is virtually impossible to ensure. *Cf. Detroit Edison* v. *NLRB*, 99 Sup. Ct. 1123, 1132 (1979) ("[T]he most realistic vice inherent in" disclosure is "the danger of inadvertent leaks"). This being the case, the Commission's policy of turning over investigative materials to charging parties is, at the very least, an indirect form of disclosure to the general public which cannot be reconciled with the statutory ban on making such information public "in any manner whatever."

The Fifth Circuit majority's contrary reading of Section 709(e) and its legislative history in *H. Kessler*

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always applied it consistently because it has not always placed a restriction on disclosure by charging parties or their counsel, including signing a nondisclosure agreement. Before the trial court in *Kessler*, it indicated:

> [T]here is no restriction imposed by the agency on the transmission of information by the charging party's attorney to others, and that there is especially no restriction on the attorney's transmission of the information obtained to the charging party. It appears that the position of the EEOC in this regard is that the question of disclosure of information by the charging party's attorney to whom the EEOC has given access to its investigative files is merely a matter of professional ethics and not an appropriate subject for EEOC regulation or restriction. 53 F.R.D. at 340 (footnote omitted).

& Co. v. *EEOC*, 472 F.2d 1147 (5th Cir. 1973) (en banc), *cert. denied*, 412 U.S. 939 (1973), on which the government relies, was carefully evaluated by the District of Columbia and the Seventh Circuits in *Sears* and *Burlington*, respectively. Although the courts in both cases indicated that it was possible to distinguish *Kessler* by limiting its holding to the specific facts presented, both went further and refuted the premises on which the *Kessler* holding rests. *Sears*, 581 F.2d at 947-48 & n. 9; *Burlington*, 582 F.2d at 1100-1101.[15] Indeed, the Seventh Circuit stated that it was constrained respectfully to disagree with *Kessler* because, *inter alia*, the Fifth Circuit's decision in that case "gave no consideration to the weighty problem of undercutting the Commission's primary role in Title VII enforcement." *Burlington*, 582 F.2d at 1101.

C. The Commission's Pre-suit Disclosure Regulations Have a Deleterious Effect on Voluntary Compliance and Conciliation

Congress has established in Title VII a carefully drawn statute for the prevention of employment discrimination and the minimization of litigation. This Court has noted that primary responsibility for securing compliance with Title VII's mandate rests with the EEOC with cooperation and voluntary compliance through its officers "as

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[15] Both the D.C. Circuit and the Seventh Circuit pointed out that, although a principal basis for the *Kessler* majority's belief that disclosure was necessary concerned the difficulties of obtaining counsel for a private lawsuit, the majority opinion took no note of the 1972 amendments to Title VII, which "substantially alleviated" this purported difficulty. *Burlington*, 582 F.2d at 1101; *Sears*, 581 F.2d at 948 & n.10. Thus, Congress empowered the federal courts in 1972 to appoint counsel for a Title VII plaintiff and to "authorize commencement of the action without payment of fees, costs, or security." 42 U.S.C. § 2000e-5(f)(1). Congress also liberalized the time limits for filing charges alleging discrimination and for filing suit based on such charges. *Id.*

the preferred means for achieving" the purposes of Title VII. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Moreover, the Court has also established that, under the Congressional design, recourse to the private lawsuit is to be the exception rather than the rule, and that it should be used only if the EEOC failed to act with due dilligence and speed. *Occidental Life Insurance Co. of California* v. *EEOC*, 432 U.S. 355, 361, 366 (1977).[16] Consequently, under Title VII, voluntary settlement is the preferred method of resolving employment discrimination claims. Such settlements are favored because they achieve compliance with Title VII "with respect to *all* employees of a given company, rather than merely for those few who might happen to file charges and later bring private actions."[17] *Sears*, 581 F.2d at 946.

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[16] In *Occidental*, this Court stated that "a natural reading of § 706(f)(1) can lead only to the conclusion that it simply provides that a complainant whose charge is not dismissed or promptly settled or litigated by EEOC may himself bring a lawsuit, but that he must wait 180 days before doing so." 432 U.S. at 361. *See also General Telephone Co.*, 100 Sup. Ct. at 1704. Aside from considerations concerning his status as a member of the public, there is no justification for EEOC's disclosure regulations permitting disclosure before 180 days have expired based on some vague notion of "compelling need," especially when the charge has not been dismissed or a right to sue notice has not been issued. See EEOC Compliance Manual § 83.3(a). *See also General Telephone Co.*, 100 Sup. Ct. at 1704 ("The EEOC was to bear the primary burden of litigation . . . .") ; and *EEOC* v. *Cleveland Mills*, 502 F.2d 153, 156 (4th Cir. 1974) ("By whatever means, however, the congressional contemplation was that there should be primary reliance upon the powers of enforcement to be conferred upon the Commission and *not* on private lawsuits, to achieve equal employment opportunity." (Emphasis added, footnote omitted.)

[17] Congress, therefore, has required that the Commission, in conjunction with state and local fair employment practice agencies, "would have an opportunity to settle disputes

The Commission's disclosure policy undermines this design in several critical ways. First, to carry out its statutory role of achieving conciliation agreements and settlement of charges, the EEOC needs to obtain certain information from defendant employers. To the extent the EEOC ignores the strictures of Section 706(b) and 709(e) and opens its files to charging parties, and thereby to the public, employers "in many cases would refuse to comply voluntarily with investigative demands by the EEOC under Section 709(e), thereby forcing the Commission to use subpoena power and suit in district court in place of amicable negotiations." *Sears*, 481 F.2d at 947. Employers would be forced into this posture, as here, so that they "would at least have the opportunity to persuade the court to impose effective restrictions on the scope of distribution—something that is beyond the power of the EEOC to do." *Id. Accord, Burlington*, 582 F.2d at 1100. Thus, there can be no doubt that the expectation of public dissemination of such information inevitably would diminish employers' willingness to comply with broadly worded investigative demands for information as in this case.[18] See Jt. App. 19-21.

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through conference, conciliation, and persuasion before the aggrieved party was permitted to file a law suit." *Gardner-Denver*, 415 U.S. at 44; and *see United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, 99 Sup. Ct. 2721, 2728 (1979).

[18] Similarly, other courts recognizing the need for candid self appraisal under Executive Order 11246, as amended, have restricted the access of Title VII plaintiffs to affirmative action materials where the incentive to engage in self-criticism was adversely affected. *See Stevenson* v. *General Eelctric Co.*, 18 FEP Cases 746 (S.D. Ohio 1976); *Johnson* v. *Southern Railway Co.*, 19 EPD ¶ 9076 (N.D. Ga. 1977); *Dickerson* v. *United States Steel Corp.*, 12 EPD ¶ 11,095 (E.D. Pa. 1976); *Sanday* v. *Carnegie-Mellon University*, 12 FEP Cases 101 (E.D. Pa. 1975); and *Banks* v. *Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D. Ga. 1971).

Second, the Seventh Circuit found, and the Commission did not disagree, "that the effect, and indeed the purpose, of disclosing investigative material to charging parties as if they were not members of the public would be to encourage the filing of private lawsuits." *Burlington*, 582 F.2d at 1100. *See also Sears*, 581 F.2d at 946. This produces the dual harmful effects of diffusing the energies of both the employer and the EEOC and maximizing the "adversariness" of the process which "will necessarily undercut the preferred enforcement scheme of comprehensive negotiation and settlement." *Burlington*, 582 F.2d at 1100.[19] *Accord*, *Sears*, 581 F.2d at 946. For as the district court in the *Sears* case observed, there is little incentive for the employer to enter into agreement with the EEOC when all private suits against the employer will remain. *Sears, Roebuck & Co.* v. *EEOC*, 435 F.Supp. 751, 757 (D.D.C. 1977), *aff'd in material part*, 581 F.2d 941 (D.C. Cir. 1978).

Significantly, although these concerns have been highlighted to the Commission by two circuits and adopted by the court below, the Commission's brief to the Court offers no satisfactory response to them. Instead, the agency asserts that those courts are in error because they did not consider "the destructive effects that their construction would have on the administrative process as a whole" and, in any event those cases, are inapposite to the matter herein because they concerned the prelitigation disclosure of systemwide files to individual charging parties. (Pet. Br. 32 n.19). Amicus disagrees.

The label which the EEOC puts on its investigation—Rapid Charge Processing System, Early Litigation Identification Program, Commissioner Charge or consolidated investigation—depending on whether narrow or broader-based charges are involved is irrelevant to the disclosure

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[19] *Cf. Charlotte-Mecklenburg*, 571 F.2d at 200 (Disclosure of sworn statements " 'could jeopardize [the EEOC's] conciliation efforts' ").

question here before the Court. Most importantly, there is no basis in Section 709(e) for such a distinction, and the government does not point to one. Furthermore, in the instant matter, as is often the case, the Commission's interrogatories are so broad (see Jt. App. 19-21) that the harmful effects of disclosure on the administrative process are present whether one, seven (as in this case) or systemwide charges are involved. *See, e.g., H. Kessler*, 53 F.R.D. 330; and note 13, *supra*. Indeed, the government does not explain why pre-suit disclosure is any less likely to impede conciliation and foster independent suits in the latter type of proceedings than in the former. Nor is there any logical basis for such an assumption. Given the large EEOC caseload, the aggregate effects of disclosure in numerous individual cases could be at least as harmful to EEOC's conciliation function as in national charge cases such as existed in *Sears*. Charging parties given access to EEOC investigative files prior to conciliation attempts by the agency are just as apt to pursue their own particular interest, rather than "results that will benefit an employer's entire workforce" (*Burlington*, 582 F.2d at 1099), regardless of the size of the respondent or the scope of the proceeding.

Furthermore, the Commission's brief does not adequately respond to the concern expressed by the courts that the EEOC's policy of disclosing its investigative files to charging parties fails to afford workable safeguards against broader dissemination of confidential data obtained from respondents. Rather, the government's answer is, again, simply to deny that the danger perceived by the courts actually exists (Pet. Br. 37-38 n.24). Considering the defects in the Commission's informal non-disclosure procedure,[20] we respectfully submit that the government's optimism about the effectiveness of that procedure is ill-founded.

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[20] *See* pp. 14-15, *supra*, and *Sears*, 581 F.2d at 946-47.

In sum, the Commission's disclosure policy cannot be defended as a necessary or proper part of its investigation and conciliation processes. Instead, it directly undermines and thwarts the statutory scheme by forcing respondents to litigate in order to obtain effective restrictions against dissemination of confidential information and by encouraging private parties to litigate rather than accept comprehensive EEOC-negotiated settlements. Accordingly, Title VII's settlement policy reinforces the language and legislative history of Section 709(e) that Congress intended to exempt disclosure to charging parties from that Section's explicit ban on release of any information in any manner.

II. DISCLOSURE OF INVESTIGATORY MATERIALS TO CHARGING PARTIES UNDERMINES IMPORTANT PROCEDURAL PROTECTIONS UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

The Commission's present disclosure regulations affording charging parties access to the investigative file materials provide them with an unrestricted discovery mechanism not contemplated by Section 709(e).[21] As the Section 709(e) language plainly implies, discovery decisions in the course of "any proceeding [arising] under this title" were intended to be reserved for the court hearing the Title VII action involving such information. To invest charging parties with discovery rights for the purpose of initiating and maintaining lawsuits is, moreover, an unnecessary and unwarranted encroachment on the basic underlying principles of the Federal Rules of

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[21] Indeed, with regard to the affirmative disclosure provisions of the Freedom of Information Act, the EEOC argued in *Charlotte-Mecklenburg* that " 'FOIA is not a substitute for discovery, and a party's asserted need for documents in connection with litigation will not affect, one way or the other, a determination of whether disclosure is warranted under FOIA' ". 571 F.2d at 203.

Civil Procedure (FRCP), which govern the procedures for processing civil lawsuits in federal district courts. FRCP Rule 1, 28 U.S.C. In the context of the language of Section 709(e), the FRCP exist as the only appropriate and sufficient method for the acquisition information by a party in support of civil litigation including an employment discrimination lawsuit. *See* FRCP Rules 26 to 38. As stated by the Fifth Circuit in a Title VII action:

> The discovery provisions of the Federal Rules of Civil Procedure allow the parties to develop fully and crystalize concise factual issues at trial. Properly used, they prevent prejudicial surprises and conserve precious judicial energies. The United States Supreme Court has said that they are to be broadly and liberally construed [citing *Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947) and *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964)].

Burns v. *Thiokol Chemical Corporation*, 483 F.2d 300, 304 (5th Cir. 1973). *See also*, *Mosley* v. *General Motors Corp.*, 10 FEP cases 1442, 1445 (E.D. Mo. 1975). (It being well settled that "the scope of discovery in Title VII cases is very broad . . . the plaintiffs will on discovery have broad access to . . . employment records"). In view of the acknowledged liberality and adequacy of the discovery procedures available to charging parties under the FRCP and in the face of the statutory language, there simply is no justification for the EEOC's disclosure regulations.

Disclosure of investigative files, more importantly, could result in considerable harm to the due process rights of employers. Materials which they submitted to the EEOC during an investigation would in effect be subject to disclosure without the benefit of the procedural safeguards to which they would otherwise have been entitled if the requests were appropriately made in the

course of litigation subject to the FRCP.[22] Under the discovery provisions of FRCP Rule 26(c), employers would be able to seek protective orders limiting the scope of discovery. Because of the kinds of information which the EEOC requested in its interrogatories (see Jt. App. 19-21) and the fact that the Commission's special disclosure regulation provides for the disclosure of employer information reports (EEO-1) and other reports (see EEOC Compliance Manual § 83.7) prescribed by the Commission pursuant to Section 709(c),[23] as will be discussed below, the importance of these procedural protections cannot be minimized.

III. BECAUSE THE COMMISSION'S DISCLOSURE REGULATIONS ARE NOT "AUTHORIZED BY LAW", DISCLOSURE OF THE CONTENTS OF THE INVESTIGATIVE FILE AND EQUAL EMPLOYMENT OPPORTUNITY REPORTS WOULD CONTRAVENE THE TRADE SECRETS ACT

A. The Investigative File and EEO-1 Report Contain Confidential Business Information

As part of its investigation of the charges in this case, the EEOC submitted broad-based interrogatories

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[22] Given the absolute prohibition on public disclosure of investigative materials "in any manner whatever" in Section 709(e), Congress could only have meant that such disclosure could occur pursuant to the discovery processes of the FRCP. *Cf. NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) ("[I]t is reasonable to construe Exemption 5 [of FOIA] to exempt those documents and only those documents normally privileged in the civil discovery context").

[23] Section 709(c) in relevant part authorizes the EEOC to require employers to maintain "such records relevant to the determination of whether unlawful employment practices have been or are being committed . . . and . . . make such reports therefrom, as the Commission shall prescribe . . . as reasonable, necessary, or appropriate for . . . enforcement . . . ." 42 U.S.C. § 2000e-8(c).

(Jt. App. 19-21) to the Respondent which, if answered, would have revealed the staffing patterns, organization and internal workings of the Respondent's stores in Western Pennsylvania. The answers to the interrogatories also would have contained other important workforce information such as wage and salary rates, listings of job categories including lines of progression, promotion rosters, and descriptions of internal training programs.

Pursuant to its authority under Section 709(c), the Commission also requires employers annually to file an EEO-1 report. In completing an EEO-1 report, a company is required to specify the type, identity, location and affiliation of the establishment covered by the report and the major activity conducted at that location, including the specific type of product or service provided by the company. Significantly, the company is also required to explain in the report any major changes in composition or reporting units together with other pertinent information. The EEO-1 lists employees in nine defined job categories which include officials and managers, professionals, technicians, sales workers, office and clerical, craftsmen (skilled), operators (semi-skilled), laborers (unskilled) and service workers, classified by the sex and minority group status of the employees at each corporate facility. After each category is totaled, these summary figures are compared with the summary figures reported for the equivalent category on the previous EEO-1 report. In short, the information contained in the interrogatories and EEO-1 would present extremely detailed data concerning the deployment of the Respondent's or any company's workforce.

Indeed, the data on the EEO-1 alone can reveal highly confidential, commercial information about a company including changes in production, processes, products or

services, production capacity, labor costs, future labor commitment and profit margins.[24] Consequently, the in-

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[24] *See, e.g., Westinghouse Elec. Corp.* v. *Schlesinger,* 329 F. Supp. 1246 (E.D. Va. 1974), and *United States Steel Co.* v. *Schlesinger,* 34 Ad. L. 2d 790 (E.D. Va. 1974), both *aff'd sub nom Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d 1190 (4th Cir. 1976), *cert. denied,* 431 U.S. 924 (1977); *Chrysler Corp.* v. *Schlesinger,* 412 F.Supp. 171 (D.Del. 1977); *vacated and remanded* in 565 F.2d 1172 (3d Cir. 1976), *vacated and remanded* in 99 Sup. Ct. 1705 (1979); *General Dynamics Corp.* v. *Dunlop,* 427 F.Supp. 578 (E.D. Mo. 1976), *rev'd on other grounds,* 572 F.2d 1211 (8th Cir. 1978); *Burroughs Corp.* v. *Brown,* 21 FEP Cases 1455 (E.D. Va. 1980), *appeal pending,* No. 80-1179 (4th Cir.); and Order filed in *Gulf Oil Corp.* v. *Marshall,* Civil Action No. 75-1491 (D.D.C. November 29, 1979), *appeal pending,* No. 80-1127 (D.C. Cir.).

For example, a study of EEO-1 data over a period of years could reveal whether there have been shifts in the make-up of the job categories of a company's workforce. This information, together with a knowledge of any new developments in a particular industry, can enable a competitor to determine whether there has been a change in the company's production processes. Similarly, a company's productive capacity can be determined from this information by comparing a company's output data from different types of operations with the type of labor and equipment used by the company.

Determination of a competitor's labor costs and profit margin can also be readily made from the company's EEO-1. By using the data concerning the size and character of the company's workforce in conjunction with Bureau of Labor Statistics compilations of average labor rates for different job classifications in each locality, it is possible to calculate a company's expenditure on manpower within particular production facilities. Derivatively, such information also reveals the types and amount of expenditures which have been made on labor-saving machinery. By taking all of this information and combining it with the costs of materials, which are fairly standard throughout an industry, a company's cost structure

formation contained in the EEO-1 in conjunction with broadly phrased interrogatories like those used herein would be extremely valuable to competitors.[25] And, as noted above, the EEOC's policy cannot assure that the information given to charging parties will not be more widely disseminated.

The statistical data contained in the documents, as well as much of the narrative information, is clearly confidential, commercial information. The documents are prepared from company files and records, and submitted to the government for the limited purpose of complying with the EEOC's reporting and investigatory requirements under Title VII. Often, written company policies designate such workforce data as sensitive and confidential, restrict the release of such data, and treat such data in a confidential manner. *See Burroughs Corp.* v.

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and profit margin can be determined. In addition, future labor commitments can be determined from the EEO-1 by studying where the on-the-job-trainees have been concentrated over a period of years.

Equipped with the information contained in a company's EEO-1, a competitor could consistently underbid the company, predict the adoption of new products, services or production processes, and reliably plan its market strategies and counterstrategies. A competitor, furthermore, could use the workforce data contained in the EEO-1 to perceive inefficiencies in its own labor force and rearrange its labor force accordingly to gain a market advantage by reducing its prices or labor costs. Such reductions would also enable the competitor to cause further injury by directing its cash flow to other aspects of the competitor's business. New competitors and management consulting firms would also be aided by such information even more directly. Both would be spared the expense of developing a labor make-up for a workforce in a particular industry.

[25] *Id.*

Brown, 21 FEP cases 1455 (E.D. Va. 1980), *appeal pending*, No. 80-1179 (4th Cir.); and *Sears, Roebuck & Co.* v. *GSA*, 553 F.2d 1378 (D.C. Cir. 1977). The information is *not* available to the public through any source or combination of sources. *Id.* Because such information clearly constitutes confidential business information, its disclosure would violate the provisions of the Trade Secrets Act discussed below.

B. Section 709(e) Does Not Authorize Disclosure of Confidential Business Information

The Trade Secrets Act, 18 U.S.C. § 1905, imposes criminal sanctions upon any government employee who "makes known in any manner or to any extent *not authorized by law* any information" submitted to his or her agency, "which information concerns or relates to trade secrets, processes, operations, style of work, . . . confidential statistical data, . . . profits, losses, or expenditures of any person, firm, partnership, corporation or association . . ." (emphasis added). This Court in *Chrysler Corp.* v. *Brown*, 99 Sup. Ct. 1705 (1979), examined the relationship of the Trade Secrets Act to agency regulations permitting or mandating disclosure of equal employment opportunity information including the EEO-1 report under the Freedom of Information Act. The Court held that whether disclosure of information pursuant to agency regulations is "authorized by law" within the meaning of the Trade Secrets Act depends upon whether there is a "nexus between the regulations and some delegation of the requisite legislative authority by Congress." *Chrysler*, 99 Sup. Ct. at 1719. Furthermore, this Court stated:

> The pertinent inquiry is whether under any of the arguable *statutory* [emphasis in original] grants of authority, the OFCCP disclosure regulations relied on by the Government are reasonably within the contemplation of that grant of authority. *We think*

> *it is clear that when it enacted these statutes, Congress was not concerned with public disclosure of trade secrets or confidential business information,* and, unless we were to hold that any federal statute that implies some authority to collect information must grant *legislative* [emphasis in original] authority to disclose that information to the public, it is simply not possible to find in these statutes a delegation of the disclosure authority asserted by the government here. *Id.* at 1720 (emphasis added, footnote omitted).
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> What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued. *Id.* at 1721.

Here, there can be no doubt based on the scant legislative history relating to Section 709(e), that, when Congress enacted Title VII, it did not mean to authorize disclosure of confidential business information. As discussed in detail above (see pp. 6-11, *supra*) the only relevant legislative history to Section 709(e) shows that Congress, at best, was concerned that too broad a ban on disclosure might impede an investigation. Therefore, like the OFCCP regulations which were of concern to this Court in *Chrysler*, the Commission's disclosure regulations are not "authorized by law" as required by 18 U.S.C. § 1905 for lawful disclosure of confidential commercial information.[26]

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[26] In *Chrysler*, the Court concluded that the disclosure regulations had a "substantive" character because they "affect[ed] individual rights and obligations." 99 Sup. Ct. at 1718. Because those regulations were not issued in conformance with the Administrative Procedures Act, the Court

In view of the principles discussed above, it is clear that the statutory and regulatory policy considerations underlying the Trade Secrets Act are designed to protect legitimate and substantial interests in the confidentiality of sensitive business information. Since the EEOC's regulations are not authorized by Section 709(e) or any other provision of Title VII, it is incomprehensible that the Commission considers itself authorized to disclose such information. As noted above (see p. 13, *supra*), Title VII is not a "disclosure statute", and examination of its legislative history reveals nothing to suggest that

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concluded that they were interpretative rules, which precluded their being given the force and effect of law. *Id.* at 1723-1725.

Title VII only grants the Commission authority to issue procedural regulations. 42 U.S.C. § 2000e-12(a). Because of this limitation in its authority, the EEOC's disclosure regulations which affect individual rights and obligations are interpretative rules. *Cf. Joseph* v. *United States Civil Service Commission*, 554 F.2d 1140, 1154 n.26 (D.C. Cir. 1977) ("[W]ithout [legislative] authority, all rules an agency issues are necessarily interpretative . . ."). Such "interpretative regulation[s] . . . cannot be the 'authoriz[ation] by law' required by § 1905." *Chrysler*, 99 Sup. Ct. at 1721.

As to the deference to be accorded the EEOC's interpretation of its organic statute, this Court recently stated in *Mohasco* v. *Silver*, 23 FEP Cases 1, 8 (1980):

> We must also reject any suggestion that the EEOC may adopt regulations that are inconsistent with the statutory mandate. As we have held on prior occasions, "interpretation" cannot supersede the language chosen by Congress [citing *General Electric* v. *Gilbert*, 429 U.S. 125, 140-142 (1976)]. (Footnote omitted).

In view of the Commission's promulgation of disclosure regulations that ignore the clear meaning of Section 709(e) as revealed by its language, purpose and history, and which are inconsistent with the Trade Secrets Act, such regulations have no force and effect. *See also Southeastern Community College* v. *Davis*, 99 Sup. Ct. 2361, 2369 (1979).

"Congress was concerned with public disclosure of trade secrets or confidential business information." *Chrysler*, 99 Sup. Ct. at 1720.[27]

CONCLUSION

For the foregoing reasons, the Equal Employment Advisory Council respectfully submits that decision of the Court of Appeals for the Fourth Circuit banning the disclosure of investigative data to charging parties, their attorneys, and others outside of government prior to commencement of a court suit should be sustained.

Respectfully submitted,

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[27] There is also the danger of unwarranted invasion of the privacy of other employees in the EEOC's disclosure policy. The Commission's subpoena seeks employment applications, payroll records, evaluations, promotion rosters identifying employees by name and sex, disciplinary records, arrest records, personnel action records, including promotions and discharge and identification of rosters of executive trainees by sex and salary. See Jt. App. 19-21. Dissemination of such information to charging parties and subsequently to others, would constitute unwarranted invasions of personal privacy not required for enforcement of Title VII—at least in the absence of a lawsuit. *See* 5 U.S.C. § 552(b)(6), (7)(c) and Privacy Act, 5 U.S.C. § 552(a); and *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976).